(1) 95-424

No.

Supreme Court, U.S.
FILED
SEP 5 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC. and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DEMARCO, DAVID HALL and BYRON CAMPBELL,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

THOMAS F. CAMPION
Counsel of Record
RICHARD E. BRENNAN
SHANLEY & FISHER, P.C.
Attorneys for Petitioners
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000

7346
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the New Jersey Supreme Court's decision which permits media defendants to create their own defense and control the applicable standard in a defamation case based on their own allegations designed to create a public controversy violates a defamation plaintiff's right to equal protection of the law.

2. Whether the New Jersey Supreme Court's refusal to consider Plaintiff John Gloria's individual libel claim as a claim distinct from that of the corporate plaintiff violated his right to equal protection of the law under the Fourteenth Amendment of the United States Constitution.

3. Whether the decision of the New Jersey Supreme Court, finding no actual malice in this record, can be sustained in light of guiding precedent of this Court such as *Masson v. New Yorker Magazine*, *Milkovich v. Lorain Journal*, and *Harte-Hanks, Inc. v. Connaughton*.

LIST OF PARTIES

The plaintiffs below were Petitioners Turf Lawnmower Repair, Inc. and John L. Gloria, individually (collectively "plaintiffs").

The defendants below included Respondents Bergen Record Corporation, Bruce Locklin, Mary Anne DeMarco, Byron Campbell, and David Hall (collectively "defendants").

Other defendants below also were Edward Mitchell, d/b/a Eddie's Power Equipment, Mark Winners, Robert Vroeginday, Douglas Livingston, John Doe and Richard Roe. These defendants were dismissed by Plaintiffs at various points of the proceedings.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
I. The New Jersey Supreme Court's carving out of an exception to its ordinary defamation standards based on defendants' election to accuse plaintiffs of consumer fraud is an impermissible expansion of the rights of a media defendant in violation of plaintiffs' constitutionally protected right in their good name and reputation and their rights to equal protection of the law.	8
II. The New Jersey Supreme Court's treatment of plaintiff John Gloria as indistinct from the corporate plaintiff violated his rights under the Fourteenth Amendment to due process and equal protection of New Jersey's libel law.	13

Contents

Page

III. The decision finding that no proof of actual malice could be found on this record conflicts with decisions of this Court and warrants the exercise of this Court's supervisory authority. 16

Conclusion 21

TABLE OF CITATIONS

Cases Cited:

Bainhauer v. Manoukian, 215 N.J. Super. 9, 520 A.2d 1154 (App. Div. 1987) 5

Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 771 P.2d 406, 257 Cal. Rptr. 708 (1989) 13

Costello v. Ocean County Observer, 136 N.J. 594, 642 A.2d 1021 (1994) 10, 13, 14

Dairy Stores v. Sentinel Publishing Co., Inc., 104 N.J. 125, 516 A.2d 220 (1986) 10, 11

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 4, 7, 8, 9

Hart-Hanks, Inc. v. Conaughton, 491 U.S. 657 (1989) ... .i, 6, 18, 19, 21

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 4, 9, 10, 11

Kassell v. Gannett Co., Inc., 875 F.2d 935 (1st Cir. 1989) . 10

Contents

Page

Lindsey v. Normet, 405 U.S. 56 (1972) 9, 14

Masson v. New Yorker Magazine, 501 U.S. 496 (1991) ... .i, 5, 6, 7, 16, 17, 20, 21

Milkovich v. Lorain Journal, 497 U.S. 1 (1990) ..... i, 6, 7

Rosenblatt v. Baer, 383 U.S. 75 (1966) 9

Sisler v. Gannett Co., Inc., 104 N.J. 256, 516 A.2d 1083 (1986) 10, 11

St. Amant v. Thompson, 390 U.S. 727 (1968) 21

Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) 10, 11

Statute Cited:

28 U.S.C. § 1257(a) 2

United States Constitution Cited:

First Amendment 2, 14, 16

Fourteenth Amendment ..... i, 3, 14

Contents

Page

Rules Cited:

Supreme Court Rules:

Rule 13.1 2

Rule 13.4 2

Rule 30 2

APPENDIX

Appendix A — Order Denying Reconsideration Dated June 6, 1995 ..... 1a

Appendix B — Opinion of New Jersey Supreme Court Dated March 15, 1995 ..... 2a

Appendix C — Opinions of the Appellate Division Dated January 3, 1995 ..... 51a

Appendix D — Transcript of the Trial Court Decision Dated July 28, 1992 ..... 64a

Appendix E — Copy of Defamatory Newspaper Articles . 78a

Appendix F — Excerpts of Deposition of Bernard A. Buranelli Dated March 12, 1992 ..... 89a

Appendix G — Excerpts of Deposition of Bruce Locklin Dated July 12, 1990 ..... 92a

Contents

	Page
Appendix H — Excerpts of Deposition of Bruce Locklin Dated August 7, 1990	97a
Appendix I — Excerpts of Affidavit of Bruce Locklin With Exhibits Dated March 30, 1992	99a
Appendix J — Excerpts of Rebuttal Affidavit of John L. Gloria Dated June 30, 1992 With Exhibit	112a
Appendix L — Letter to Superior Court Justice Marguerite T. Simon With Exhibit B	119a
Appendix M — Excerpts of Deposition of Mary Anne De Marco Dated May 7, 1990	125a
Appendix N — Letter to Superior Court Justice Marguerite T. Simon Dated June 9, 1992 With Enclosure	128a
Appendix O — Affidavit of Hampden H. Smith Dated May 20, 1992 With Excerpts of Exhibit A	132a
Appendix P — Affidavit of Michael J. Dignan Dated May 25, 1992 With Exhibits	136a

No.

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC. and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DEMARCO, DAVID HALL, AND BYRON CAMPBELL,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

Petitioners Turf Lawnmower Repair, Inc. ("Turf") and John L. Gloria ("Mr. Gloria"), the plaintiffs below, respectfully pray that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court entered on March 15, 1995, which affirmed the judgment of the Superior Court of New Jersey, Appellate Division entered on January 3, 1994. Petitioners sought timely reconsideration from the New Jersey Supreme Court, which was denied in an order dated June 6, 1995.

OPINIONS BELOW

The June 6, 1995 order of the New Jersey Supreme Court denying reconsideration is unreported and is reproduced hereto as Appendix A. The March 15, 1995 decision of the New Jersey Supreme Court affirming the judgment of the Superior Court of New Jersey, Appellate Division, is reported at 139 N.J. 392, 655 A.2d 417 (1995), and is reproduced as Appendix B. The January 3, 1994 decision of the Superior Court of New Jersey, Appellate Division affirming the trial court's grant of summary judgment in favor of defendants is reported at 269 N.J.Super. 370, 635 A.2d 575 (App. Div. 1994), and is reproduced as Appendix C hereto. The July 28, 1994 decision of the Superior Court of New Jersey, Law Division, Bergen County granting defendants' summary judgment is unreported and is reproduced as Appendix D hereto.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the March 15, 1995 judgment of the Supreme Court of New Jersey is invoked under 28 U.S.C. § 1257(a). This Petition for Certiorari is timely filed as it is filed on the first business day after the ninetieth day since the date of the order denying rehearing, which is permitted under Supreme Court Rule 30 since the ninetieth day, September 4, was Labor Day. *See* Rules of the Supreme Court of the United States, Rules 13.1 and 13.4.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of

> speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1, provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE

Petitioners, defamation plaintiffs, suffered grave wrong and the loss of their livelihood as a result of, in the words of the New Jersey Supreme Court, the gross negligence of the defendant newspaper, New Jersey's *Bergen Record*. (Petitioners' Appendix, *infra*, 43a; 60a). Nonetheless, with a holding even uninvited by the briefs submitted by defendants, the court granted defendants the protection of a state law fair comment privilege, finding that defendants' accusations that plaintiffs engaged in consumer fraud created a public interest controversy under the New Jersey Consumer Fraud Act. (33a). The New Jersey Supreme Court found that while plaintiffs themselves, who owned a prosaic lawn mower repair service, had done nothing to create a public controversy that would justify application of the actual malice standard (28a), defendants' allegations of consumer fraud

engendered a public controversy. (29a). Consequently, defendants were permitted to create their own defense and dictate the choice of the applicable standard in this action simply by accusing plaintiffs of things that sounded like consumer fraud.

This Court should grant certiorari and reverse the decision of the New Jersey Supreme Court because its decision impermissibly grants media defendants the right to control, in violation of the plaintiffs' right to equal protection of law, the application of the governing standard in a defamation action. By their editorial selectivity regarding the content of their article, defendants created a public controversy and then relied on the resulting public interest to assert the benefits of the state law privilege. Worse bootstrapping to gain protection in defamation cases can scarcely be imagined. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) ("Clearly those charged with defamation cannot, by their conduct, create their own defense by making a claimant a public figure").

Plaintiffs have maintained throughout these proceedings it was the nature of their activity that must trigger any public interest privilege. As plaintiffs argued in their appellate court brief, which were submitted to the New Jersey Supreme Court on certification, "The proper focus of the public interest analysis must be on the activities of the party who is subject of the communication, not on the reporter." (Reply Brief, March 29, 1993, p. 14, n.6). After the Appellate Division held that all business and their proprietors must prove actual malice if they are the subject of a consumer report, plaintiffs argued to the New Jersey Supreme Court: " 'While *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) speaks in terms of the press and broadcast media, it does not appear that its holding is intended to be so limited. We understand *Gertz* as focusing on the nature of the alleged defamatory communication and the person defamed rather than on the person publishing the defamation.' " (Reply Brief in

Support of Petition for Certification, February 28, 1994, p. 5 (*quoting Bainhauer v. Manoukian*, 215 N.J.Super. 9, 32, n.7, 520 A.2d 1154 (App. Div. 1987)).

Turf, a small lawn mower repair business, was the subject of a defamatory article in the August 21, 1988 *Bergen Record*, a newspaper published by defendant Bergen Record Corporation. John Gloria was the president of Turf and was also defamed by the article, a "sting piece." Defendant Bruce Locklin ("Locklin") was the Bergen Record reporter who wrote the defamatory article. Defendant Mary Anne DeMarco ("DeMarco") was Locklin's research assistant. Defendants Byron Campbell ("Campbell") and David Hall ("Hall") were Locklin's superiors and were responsible for the content of the article.

Turf and Mr. Gloria sued defendants for libel after publication of the article, which is reproduced as Appendix E. Plaintiffs uncovered, through discovery, evidence of defendants' actual malice which showed that they published with knowledge of the falsity and with reckless disregard for the truth. In reviewing defendants' motion for summary judgment, both the trial court and the Supreme Court of New Jersey acknowledged that defendants were negligent and perhaps grossly negligent in their publication and methodology. (43a). But in contravention of precedent of this Court, which it ironically cited and on which it purported to rely, the New Jersey Supreme Court concluded that plaintiffs could demonstrate no proofs sufficient on which a finding of actual malice could be made. It affirmed the grant of summary judgment in favor of defendants and deprived plaintiffs of a chance to present their case to a jury.

In holding that the evidence did not permit a finding of actual malice, the New Jersey Supreme Court clearly erred in taking this issue away from a jury. Defendants materially altered quotations, *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), implied

falsifications that they knew were untrue, *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), and were so radical in their departure from sound journalistic practices as to be guilty of actual malice. *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989):

• Defendants quoted a Turf employee as saying "we could have got you for 50 to 60 [dollars]" (84a), but left out the all important balance of the quotation, "[o]bviously the tune up might have held you for a week or two or three." (121a).

• Defendants reported that Turf did poor work on mowers in order to generate more work later in the season (81a), omitting from their report that Turf guaranteed its work for the entire season (93a);

• Defendants reported that Turf misdiagnosed problems and charged for work that was not done (79-80a), but defendant DeMarco admitted at her deposition that this was not true of her experience with Turf. (127a).

• Mr. Gloria told the newspaper prior to publication that defendants' allegations were false, but defendants did nothing to confront this pre-publication charge of falsity. (85a). (*See* Point III, *infra*).

Petitioners have argued since the trial court proceedings that New Jersey has adopted the federal test for actual malice, and therefore, in the event that the actual malice standard were applied (the application of which they have opposed at all levels of this matter), then this Court's decisions such as *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), and *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657 (1989) must guide. In their Petition for Certification to the New Jersey Supreme Court, plaintiffs specifically requested that the court address whether the

Appellate Division erred "in concluding that a jury question was not presented by plaintiffs' proofs as to whether the defendants acted with actual malice, in light of the United States Supreme Court decisions in *Masson* and *Milkovich*." (Petition for Certification, February 2, 1994, p. 5).

Plaintiffs engaged in no activity that triggered any public interest privilege on behalf of defendants. According to the opinion of the New Jersey Supreme Court, they engaged in the prosaic business of lawn mower repair of insufficient importance to trigger the actual malice standard that would apply in a defamation action to a business involved in a public interest activity. (28a). Under the reasoning of the New Jersey Supreme Court, it was not the activity of plaintiffs, but the reporting activity of the defendants themselves that caused the court to hold that plaintiffs must satisfy the federal actual malice standard. (29a). With a holding unanticipated in light of the issues addressed by the parties, the court held that merely because defendants accused plaintiffs of conduct which may have run afoul of the New Jersey Consumer Fraud Act, plaintiffs must demonstrate actual malice. Plaintiffs' basic constitutional right to protection of their good name and reputation, *see Gertz v. Welch*, 418 U.S. 323, 341 (1974), was arbitrarily diminished, in violation of principles of equal protection, by the New Jersey Supreme Court's decision to permit the content of defendants' article to dictate the degree of protection given to their statements.

Although for purposes of of a summary judgment in a defamation action plaintiffs are entitled to the factual assumption that the reported statements are false, the New Jersey Supreme Court turned due process upon its head, holding that for purposes of establishing whether defendants' choice of content triggered the actual malice standard, "We examine the article in its entirety assuming that all its allegations are true." (33a). In this light, the New Jersey Supreme Court, in violation of constitutional

principles of equal protection, has impermissibly permitted the defendants to create their own defense and to control the choice of the governing standard simply by their election to make certain accusations of consumer fraud.

There are other compelling reasons for this Court to grant certiorari. Although citing and purporting to rely on precedent of this Court, the New Jersey Supreme Court turned a blind eye to the overwhelming proofs of defendants' actual malice. Plaintiffs turn to this Court to vindicate their rights and to uphold the constitutional principles which the courts below ignored. Moreover, plaintiffs ask this Court to rectify the New Jersey Supreme Court's failure to distinguish John Gloria, personally, from the corporate plaintiff. Mr. Gloria has personal rights to equal protection, quite apart from those of Turf. The New Jersey Supreme Court's failure to acknowledge Mr. Gloria's rights, and to address the personal defamation directed at him by defendants, was arbitrary and capricious.

REASONS FOR GRANTING THE WRIT

I.

THE NEW JERSEY SUPREME COURT'S CARVING OUT OF AN EXCEPTION TO ITS ORDINARY DEFAMATION STANDARDS BASED ON DEFENDANTS' ELECTION TO ACCUSE PLAINTIFFS OF CONSUMER FRAUD IS AN IMPERMISSIBLE EXPANSION OF THE RIGHTS OF A MEDIA DEFENDANT IN VIOLATION OF PLAINTIFFS' CONSTITUTIONALLY PROTECTED RIGHT IN THEIR GOOD NAME AND REPUTATION AND THEIR RIGHTS TO EQUAL PROTECTION OF THE LAW.

In *Gertz v. Welch*, 418 U.S. 323 (1974), this Court reaffirmed that individuals have a right to protection of their good name and

reputation, which was "basic" to "our constitutional system" and which reflected "no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty." *Gertz*, 418 U.S. at 341 (*quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, *J.*, concurring)). Although *Gertz* held that as long as states "do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory injurious to a private individual," 418 U.S. at 347, it remains a vital fact of constitutional law that once a state establishes such a standard, it must apply that standard and remedy equally to all individuals, mindful of their federally protected rights to maintenance of their good name and reputation, and of their rights to equal protection of law. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (equal protection clause does not require appellate review after trial, but once state provides for such review it cannot grant relief to some litigants and capriciously or arbitrarily deny it to others without violating equal protection clause).

In the case at bar, the New Jersey Supreme Court has provided media defendants with a perpetual "safe harbor" by holding that anything that they say or write about anybody, so long as it is couched in terms of "consumer fraud," is subject to the heightened standard of actual malice. This is not only very dangerous, but it arbitrarily grants the media defendant control over the degree of protection that will attach to their speech by permitting them to create their own defense. All a media defendant needs to do is simply include in its report a single sentence that could be construed to implicate a consumer fraud statute and *ipso facto* the entire article will be protected by the actual malice standard. This Court has forbidden the bootstrapping permitted by the New Jersey Supreme Court. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the plaintiff, a research director at a state hospital, received a "Golden Fleece

Award" from Senator William Proxmire, reflecting the senator's belief that the plaintiff's federally funded research grant represented wasteful government spending. In assessing the appropriate standard for the plaintiff's defamation claim, this Court held:

> To the extent the subject of [plaintiff's] published writings became a matter of controversy, it was a consequence of the Golden Fleece Award. Clearly, those charged with defamation cannot, by their conduct, create their own defense by making the claimant a public figure.

Hutchinson, 443 U.S. at 135; *see Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167-68 (1979); *Kassell v. Gannett Co., Inc.*, 875 F.2d 935, 941 (1st Cir. 1989) ("Gannett says, accurately enough, that Kassell attracted considerable attention following publication of the Vietnam retrospective. But, that is bootstrapping of the most flagrant sort.").

The New Jersey Supreme Court has generally held that businesses and private individuals must ordinarily establish only a defendant's negligence to prevail in a defamation action, unless they have involved themselves in a public interest activity or engaged in an activity they know is likely to trigger public interest. *See Costello v. Ocean County Observer*, 136 N.J. 594, 612, 642 A.2d 1021, 1021 (1994); *Dairy Stores v. Sentinel Publishing Co., Inc.*, 104 N.J. 125, 516 A.2d 220 (1986); *Sisler v. Gannett Co., Inc.*, 104 N.J. 256, 516 A.2d 1083 (1986). Prior to the decision below, whenever the New Jersey Supreme Court required a private person or business to demonstrate actual malice in a defamation action, the court looked to whether it was conduct on the part of the plaintiff that created a public interest. Thus, in *Dairy Stores*, the plaintiff convenience store chain sold

bottled water intended for human consumption, an activity regulated by state law. The New Jersey Supreme Court held that plaintiff in that case had to show actual malice because the product was intended for human consumption and because the activity was regulated, facts which created a public interest in the stores' activity in selling bottled water. *Dairy Stores*, 104 N.J. at 145, 516 A.2d at 230. Moreover, in *Sisler*, the plaintiff, a private person, nonetheless was held to the actual malice because he obtained a large loan from a bank which he had founded and of which he was a former President. The court reasoned in *Sisler* that banking activities are heavily regulated and that the plaintiff had engaged in conduct he knew was likely to create a public interest by obtaining the loan. *Sisler*, 104 N.J. at 275, 516 A.2d at 1093.

In the opinion below, however, the New Jersey Supreme Court deviated from its framework by holding Plaintiffs to an actual malice standard because of the actions and accusations of the defendants themselves. The New Jersey Supreme Court thus sanctioned a distinction in treatment of defamation plaintiffs based on conduct of defendants, an arbitrary factor that creates an unconstitutional difference in the protection of law afforded plaintiffs. Plaintiffs respectfully submit that this violated their right to equal protection of the law by capriciously and arbitrarily granting defendants the right to create their own defense. *See Hutchinson*, 443 U.S. at 135; *Wolston*, 443 U.S. at 167-68.

When the New Jersey Supreme Court wrote that the application of the appropriate standard was resolved by examining "the article on its entirety assuming that all of [defendants'] allegations are true," it not only turned the summary judgment standard on its head, but it effectively granted to defendants the right to dictate the degree of protection afforded to plaintiffs' constitutional right to protection of their good name and reputation. When confronted with a gray question of consumer fraud, a reporter will now be emboldened by the

standard of the New Jersey Supreme Court to make an allegation of consumer fraud — a decision that will grant the media greater protections and diminish the constitutional protections afforded the plaintiff's reputation. This is the self-created media safe harbor that we ask this court to examine.

The California Supreme Court's observations of the capricious consequences of permitting the media to assert a public interest privilege based simply on their publication are instructive:

> It can be fairly said that the media themselves often select, by virtue of what they choose to publish, the subjects that become matters of public interest. "[T]he decisions they [media executives] make about which stories are worth covering and which are not largely determine what issues emerge on the national agenda for discussion and action by the Congress, the courts, the White House and the body politic." (citation omitted). A treatise published by the American Newspaper Publishers Association Foundation states, "The bootstrap nature of this extension [of a privilege to everything that is published] contains inherent dangers for individual reputation and would largely do away with recovery for defamation. To a significant extent, the mere act of publishing material in the mass media creates public interest in its contents. The more sensational and hence injurious a statement is, the more 'public interest' it generates. Consequently, the more damaging the charge, the more likely it would be privileged even though negligently erroneous.

Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 771 P.2d 406, 432, 257 Cal. Rptr. 708 (1989).

We ask this Court to grant *certiorari* and reverse the holding of the New Jersey Supreme Court. The correct application of constitutional principles dictates that while a state may require a private person or business in a defamation action to show actual malice if it has affirmatively taken steps to create a public interest or controversy, it is violative of equal protection to subject a plaintiff to the stricter standard because of the conduct of the defendants, the nature of their report, or their editorial election as to the content of their report. As a corresponding constitutional principle, this Court should announce that defendants cannot claim a state law privilege based on the controversy they created.

II.

THE NEW JERSEY SUPREME COURT'S TREATMENT OF PLAINTIFF JOHN GLORIA AS INDISTINCT FROM THE CORPORATE PLAINTIFF VIOLATED HIS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO DUE PROCESS AND EQUAL PROTECTION OF NEW JERSEY'S LIBEL LAW.

Defendants' article included a vindictive attack on Mr. Gloria personally, commentary that was neither in the public interest nor necessary to further the asserted purpose of the article — to warn the public of Turf's allegedly improper business practices in fixing lawn mowers. Defendants called Mr. Gloria petty, vindictive, dishonest, and unethical. They made reference to the car he drove, to the value and location of his home, and even to his family life. Under New Jersey law, a private person must only ordinarily demonstrate negligence to prevail in a libel action. *Costello v. Ocean County Observer*, 136 N.J. 594, 612, 643 A.2d 1012, 1021 (1994). In the opinion below, however, the

New Jersey Supreme Court ruled that when a media defendant charges a private person of conduct violative of the New Jersey Consumer Fraud Act, the plaintiff must show actual malice, as defined by this Court under First Amendment principles, in order to prevail.

The New Jersey Supreme Court only examined the article to determine whether defendants had accused Turf of violating the state Consumer Fraud Act. It undertook no discussion as to whether defendants accused Mr. Gloria, as an individual, of anything that violated the act. A thorough review of the article reveals no allegation that Mr. Gloria, personally, did anything which violated the Consumer Fraud Act. The New Jersey Supreme Court found only three allegations in the article that might support a claim under the Consumer Fraud Act, none of which involved Mr. Gloria personally. As such, under the defamation law of the State of New Jersey, Mr. Gloria must only show negligence in order to prevail in his defamation case. *Costello*, 136 N.J. at 612, 643 A.2d at 1021. Significantly, the New Jersey Supreme Court acknowledged that there was evidence of defendants' negligence and perhaps even gross negligence.

It has been well established by this Court that once a state confers a right on its citizens it must make that right available to all of its citizens in accordance with the Fourteenth Amendment guarantee of equal protection of law. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972). In this case, the New Jersey Supreme Court denied Mr. Gloria, as an individual, equal protection under its defamation law by treating him as indistinct from the corporate plaintiff. Indeed, the New Jersey Supreme Court completely overlooked John Gloria, the individual, in its analysis, and implicitly ruled that if a corporate plaintiff must prove actual malice, then so must an individual plaintiff. This ruling exposes all small business owners to personal attack, not in the public

interest, merely because the speaker makes at least one allegation that the plaintiff's business violated the Consumer Fraud Act. Business owners thus become potential victims of the same defamation directed at Mr. Gloria by defendants merely because of alleged conduct of their business and a media defendant's choice to couch their report in terms of consumer fraud.

Defendants bootstrapped Mr. Gloria to his business and then leveled a gratuitous personal attack upon him neither necessary nor in the public interest. No public interest was advanced by defendants' attack on Mr. Gloria personally. Defendants' "public interest" purpose, the "unmasking" of Turf to the consuming public, could have been accomplished without defaming Mr. Gloria, all of which resulted from the opinions of persons whom the court below acknowledged had obvious axes to grind with him. The New Jersey Supreme Court's failure to distinguish Mr. Gloria from the corporate entity violated Mr. Gloria's right to the equal protection of New Jersey defamation law and subjected him to a vicious and false personal attack for which he is now, as an individual, told he has no redress. We ask this Court to issue a writ of certiorari to remedy this injustice and to permit Mr. Gloria to present his case to a jury granting him the benefit of the same standard as any other private person under New Jersey law, the negligence standard.

III.

THE DECISION FINDING THAT NO PROOF OF ACTUAL MALICE COULD BE FOUND ON THIS RECORD CONFLICTS WITH DECISIONS OF THIS COURT AND WARRANTS THE EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY.

In *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), this Court held that the First Amendment did not protect publications that altered quotations in a manner which materially changed their meaning. This Court wrote that "an exact quotation out of context can distort meaning, although the speaker did use each reported word." 501 U.S. at 515. Consequently, this Court held that a deliberate alteration of words uttered by a speaker equates "with knowledge of falsity" when the alteration "results in a material change in the meaning intended by the statement." *Id.* at 158. In the case at bar, the New Jersey Supreme Court, purporting to rely on constitutional principles and precedent of this Court,[1] found in the record no proofs suggestive of defendants' actual malice despite the indisputable proof that they fabricated and altered quotations to materially change their meanings, casting plaintiffs and their services in a false negative light. The New Jersey Supreme Court's reliance on precedent of this Court which it did not accurately cite warrants the exercise of this Court's supervisory authority.

Defendants' report of their first test at Turf falsely implies,

---

1. That the New Jersey Supreme Court relied on federal law as established by this Court is beyond dispute. Justice Stewart Pollock wrote in his concurring opinion that "I would be less than faithful if I did not express regret about the majority's excessive reliance on federal cases and on the concept of 'actual malice.' If only the Court would look to its own decisions it could solve the present problem without resort to constitutional principles." (49a).

by use of an altered quotation out of context, that Turf told Locklin that his 18-year-old Lawn-Boy mower could not be fixed in order to sell him a new one. (84a). Defendants wrote that in the context of this "bait-and switch" sales pitch the Turf employee said, while pointing to the work order, "We could have got you for 50 to 60." (84a).

In fact, that comment came long before,[2] when the employee was explaining why Turf did not perform a costly, stop-gap repair authorized by Locklin on a lawn mower not worth repairing. The employee actually said, "We could have got you for 50 to 60. *Obviously the tune up might have held you for a week or two or three.*" (121a). By taking the quotation out of context and by omitting the underscored language, defendants completely altered its substantive meaning. The alteration of this quotation, and its intentional use out of context, was plainly indicative of knowledge of falsity within the holding of *Masson*.

For their second test, defendant DeMarco brought Locklin's Lawn-Boy, now with a broken on/off switch (103a-104a), to Turf and said that it would not start. Her notes indicate that both she and Locklin knew about the broken on/off switch, although defendants reported that all that was wrong with the mower was that the spark plug had been disconnected. (84a). Turf noticed the broken on/off switch and asked DeMarco to leave the mower. A Turf mechanic obviously thereafter connected the spark plug while examining the machine, and thereafter the mower started.[3]

---

2. The tape shows that Locklin initiated the discussions about purchasing a new mower without prodding from Turf, a fact contradicted by the false inference of defendants' report. (122a). Locklin asked, "What kind of deal can you give me on a new lawnmower?" Then, defendants turned around and falsely charged that Turf "*offered* to take $20 off the price pf a new mower, saying that even the manufacturer couldn't fix the Lawnboy [sic]." (84a).

3. A disconnected spark plug would be of little consequence to a trained
(Cont'd)

Turf reported to DeMarco that the machine was starting, recommended maintenance, and fixed the on/off switch for free. Defendants reported that Turf proposed a tune up[4] as the remedy to start the mower, when in fact Turf quite candidly told DeMarco that it did not understand why the mower did not start for her since it had "started up just fine for us." (108a).

Although defendants reported that "Turf misdiagnosed problems, recommended work that wasn't needed, and charged for work that wasn't done," DeMarco admitted at her deposition that this was not true. (127a). This alone creates a jury issue on actual malice.

The decision below conflicts with other precedent of this Court. The New Jersey Supreme Court, reciting the long list of the article's journalistic shortcomings both in the manner in which it was investigated and the manner in which it was prepared and presented, wrote that "[t]he record confirms that much of plaintiffs' experts' criticism of the article are justified, particularly their emphasis on the omission of relevant information and reliance on biased sources." The New Jersey Supreme Court wrote further that it "agreed with the trial court that Locklin's methods may have negligent or even grossly negligent." But in violation of *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657 (1989), the court made no analysis of

---

(Cont'd)
mechanic asked to service a mower, since lawn mower manufacturers warn that the spark plug should be disconnected during transportation to avoid sudden starts. (139a-140a).

4. Turf suggested a tune up after asking DeMarco when she had last serviced the Lawn-Boy. When DeMarco lied, and told Turf that she did not know, Turf recommended a tune up. (101a-102a; 103a). Defendants thus faulted Turf for its recommendation, which resulted only from the consciously false information provided by defendants.

whether the circumstantial evidence concerning defendants' motives and professional care was probative on the actual malice inquiry, 491 U.S. at 668, a startling omission given the court's finding that defendants were perhaps grossly negligent in the manner in which they researched and reported the story.

• The article said the reader that the newspaper's tests were "independent." (79a). This is a knowing falsehood. Not only were the tests conducted by *The Record* itself, they were conducted without any independent supervision or expert guidance. (90a-91a; 93a).

• The article reports that Mr. Gloria made $1.5 million before he was 30 (78a), without reporting that he in fact made the money from real estate investments. (135a). The article intentionally and falsely implied that Mr. Gloria became wealthy by running a crooked shop.

• The Record told its readers that Mark Winners quit rather than cheat customers (81a), but defendants' own notes reflect that Winners — who "wanted to beat the crap out of [Gloria]" — admitted to Locklin that he was fired for performing work on the side for Turf customers without Mr. Gloria's knowledge or permission. (96a; 111a). The reader never learned that Winners was actually fired for cheating his employer.

• After Turf declined to perform a $60 repair on the virtually worthless Lawn-Boy, defendants took the mower to a repair shop in Nanuet, New York, which offered a $60 estimate but then charged them $114 to repair the carburetor. (94a-96a). Although defendants acknowledged that they were overcharged by the Nanuet shop, they did nothing to confirm that it properly diagnosed the problem or performed satisfactorily. (96a).

• For their third test of Turf, Locklin brought a Bobcat mower with a disconnected spark plug to Turf. He spoke to a

service writer at the counter, whom Locklin knew was not a mechanic, and told him that the mower would not start. The Turf employee told Locklin to leave the mower for a mechanic to examine. Locklin, however, badgered the counterman until he took a quick look at the machine. The Turf employee told Locklin that the mower was in good shape but perhaps needed a tune up. Locklin agreed to a tune up for $59.95 plus tax, and signed an authorization. Turf performed the work as agreed. (98a; 110a). Nonetheless, the article faulted Turf for performing the very work that Locklin had authorized.

• Defendants Hall and Campbell ignored a pre-publication notice of falsity addressed to them by Mr. Gloria, a press release asserting the falsity of The Record's accusations, which they turned over to Locklin. (85a). See Harte-Hanks, Inc., 491 U.S. at 692 (purposeful avoidance of truth can be found where there was no action to confront pre-publication of falsity).

• Defendants charged that Turf did poor work in order to generate more work later in the season (81a), even though they knew that Turf guaranteed its work for the entire season and did not charge customers for work performed on the same mower later in the season. (93a).

• Defendants taped all their tests and interviews, but erased all of the tapes, with the exception of the first and last tests. Defendants did not confirm the accuracy of their work in progress with any of the actual tapes, and their report of what occurred during their tests at Turf is contradicted by the content of the tapes. *See Masson*, 501 U.S at 521 (when story is not hot news, reporter should confirm accuracy of work in progress with tapes).

On this record, and in light of principles of this Court on which the New Jersey Supreme Court purported to rely, its holding that plaintiffs would not have been able to prove defendants' actual malice at a trial on the merits is unsustainable

and in direct conflict with prior opinions of this Court. Although the meaning of "actual malice" cannot be captured in "one infallible definition," this Court through its cases has furnished meaningful guidance for . . . further definition," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), in order to "give content to these otherwise elusive constitutional standards." *Harte-Hanks*, 491 U.S. at 686. This case provides an ideal vehicle to further define and give content to these constitutional principles. Consequently, petitioners respectfully pray for the issuance of a writ of certiorari to the Supreme Court of New Jersey.

CONCLUSION

For all the foregoing reasons petitioners respectfully request the Court to issue a writ of certiorari to review and reverse the decision of the New Jersey Supreme Court.

This Court last reviewed the competing considerations of defamation plaintiffs and media defendants in *Masson v. New York Magazine*. The time has come for this Court to address the intolerable situation created by the New Jersey Supreme Court: the license given to newspapers to bootstrap themselves to protection by choosing to do a "consumer sting."

Respectfully submitted,

THOMAS F. CAMPION
Counsel of Record
RICHARD E. BRENNAN
SHANLEY & FISHER, P.C.
Attorneys for Petitioners
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000

APPENDIX A — ORDER DENYING RECONSIDERATION DATED JUNE 6, 1995

SUPREME COURT OF NEW JERSEY
M-1218 September Term 1994
38,043

TURF LAWNMOWER REPAIR, INC., etc., et al.,

Plaintiffs-Movants,

v.

BERGEN RECORD CORPORATION, et al.,

Defendants.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the Court's Opinion and Judgment is denied.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 6th day of June, 1995.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

[stamped]
I hereby certify that the foregoing
is a true copy of the original on file
in my office.
s/ Stephen Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

APPENDIX B — OPINION OF NEW JERSEY SUPREME COURT DATED MARCH 15, 1995

SUPREME COURT OF NEW JERSEY
A-27 September Term 1994

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs-Appellants,

v.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DE MARCO, DAVID HALL, AND BYRON CAMPBELL,

Defendants-Respondents,

and

EDWARD MITCHELL, d/b/a Eddie's Power Equipment, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE and RICHARD ROE, INC.,

Defendants.

Argued: October 24, 1994
Decided: March 15, 1995
Approved for Publication: March 15, 1995

On certification to the Superior Court, Appellate Division, whose opinion is reported at 269 N.J. Super. 370 (1994).

Richard E. Brennan argued the cause for appellants (Shanley & Fisher and Mark P.

Denbeaux, attorneys; Mr. Brennan, Mr. Denbeaux, and Joseph M. Cerra, on the briefs).

Peter G. Banta argued the cause for respondents (Winne, Banta, Rizzi, Hetherington & Basralian, attorneys; Donald A. Klein and Craig L. Levinsohn, on the brief).

Thomas J. Cafferty argued the cause for amicus curiae, New Jersey Press Association (McGimpsey & Cafferty, attorneys; Mr. Cafferty and Arlene M. Turinchak, on the brief).

The opinion of the Court was delivered by

GARIBALDI, J.

This defamation appeal involves two newspaper articles that accused plaintiffs, Turf Lawnmower Repair, Inc., (Turf) and its owner and president, John L. Gloria, of deceptive business practices that "ripped off" customers. In this appeal we determine whether actual malice is the appropriate standard for all businesses, or whether negligence is the more appropriate standard of proof in defamation actions that involve businesses whose activities do not concern matters of public health or safety, do not constitute consumer fraud, or whose businesses are not subject to substantial government regulations.

I

On Sunday, August 21, 1988, The Record published a special report by its Special Investigative News Editor and staff writer, Bruce Locklin, entitled, "A clip joint for lawn mowers, Tests, ex-

workers reveal Teaneck shop deceives, overcharges." A sub-article entitled "Looking for honesty with a faulty machine" accompanied the lead article.

The lead article's author was Locklin, who characterized Gloria, the owner of Turf Lawn Mower Repair, as "fiercely ambitious." "[H]e set out to become a millionaire by age 30 and later run for Congress." Locklin also reported that Gloria, then age twenty-nine, had made his first million. Locklin then wrote:

> But his success is flawed. Though his shop did about 12,000 repair jobs in the past three years, former employees estimate that 60 percent to 80 percent were rip-offs.
>
> Most customers who paid for tune-ups got little more than an oil change and a new spark plug — for which they typically were overcharged $20 to $30. Some paid for new parts and got used parts from junked mowers. Many were charged for repair work that was never done.
>
> Independent tests conducted by The Record produced similar results. Reporters brought in mowers in need of simple repairs. Each time, Turf recommended or performed unnecessary work.

Locklin continued, quoting former customers, former employees, and a competitor:

> There's a pervasive rudeness at Turf, where

employees often add insult to injury. One customer, Andrea Daglezt of Bogota, said the man behind the counter talked to her as if she were an idiot. "That guy almost had my fist down his throat," she said. "He was so nasty . . . ."

Winners is a former Turf mechanic who stayed on for about a year after Gloria became boss.

"When he worked for Bob, he was a nice guy. As soon as he took over, everything changed," Winners said. "I ended up quitting because . . . I was tired of customers getting ripped off."

Winners said Gloria made bogus tuneups standard procedure. No longer did mechanics routinely install new points and condensers or rebuild carburetors by replacing worn parts.

Instead, the mowers got nothing more than fresh oil, a spark plug, and a quick cleanup. Labor time dropped from 30 or 40 minutes per mower to about 5 minutes.

Three other former mechanics, who each worked at Turf for about two years during the 1980-86 period, said they had the same instructions: Do the fake tuneups — but at full tuneup prices.

Appendix B

Mowers often broke down later in the season, the mechanics said, generating more repair work and opportunities to sell new mowers.

Bob Vroeninday, 27, now an auto mechanic in Ridgefield Park, said that when he was working for Turf in 1982 and 1983, Gloria used parts from junked mowers for repair work — without telling customers.

"On a cracked flywheel, he'd use an old one and charge you for a new one because that stuff you can't see," Vroeninday said.

Winners and Vroeninday said Gloria often lied to customers who brought in mowers that had jammed after hitting something solid. He would say the mower's crankshaft needed to be straightened when, in fact, the machine needed only a small part called a keyway. Its price? About $1.

"A job that should have cost $20 would cost about $90," Vroeninday said.

If a customer spotted a rip-off and complained, Gloria blamed his workers.

Doug Livingston, a Turf mechanic from 1984 to 1986, recalled how Gloria tried to make him the scapegoat to appease an angry customer. "He immediately turned around and pointed at me and said, 'This is the guy

who worked on it. It's not my fault he didn't do his job."'

Livingston, who now works at a Fair Lawn shop, said Gloria sometimes got vindictive if a customer became impatient. "He would get mad at him and just kick the machine in the back and say, 'Don't touch that for a week."'

One customer got sick of being told "we're working on it" for more than a month. Ron Broking, who owns Ronnie's Restaurant in Palisades Park, went around back and found his mower untouched.

"It never, never got looked at," Broking said. "That's what burned me up because it was a lie." Broking packed his mower in his car and took it to another shop.

Mel Clansky of New Milford had a tougher time of it. He paid Turf $54 to fix his electric mower. But when he took it home, it still didn't work. Clansky took it back to Turf and, while waiting, bought a new machine for $150. Turf called and wanted $200 to repair the old machine.

Clansky just wanted the mower returned, but Turf couldn't find it. He gave up in disgust.

"I wasn't going to bother taking the time off to go to small claims court," Clansky said. "It was unbelievable."

Appendix B

After these lengthy assertions, Locklin commented on The Record's tests:

> [T]ests conducted by The Record produced evidence of systematic rip-offs at Turf. Reporters took mowers there three times. Turf employees misdiagnosed problems, recommended work that wasn't needed and charged for work that wasn't done. . . .
>
> The Record's tests at Turf started in June with a Lawnboy machine that needed carburetor repair. Turf kept the machine three weeks, charged a $20 diagnostic fee, and said it couldn't be fixed.
>
> A Turf salesman offered to take the $20 off the price of a new mower, saying that even the manufacturer couldn't fix the Lawnboy. He pointed to Turf's standard tuneup price and said, "We could have got you for $50 or $60."
>
> A reporter took the mower to a Lawnboy dealer in Nanuet, N.Y., where it was repaired and tuned up. Later, a second reporter took the same machine back to Turf. This time the spark plug clamp had been disconnected, and the reporter said she couldn't get the machine started.
>
> Turf kept the machine another three weeks, charged a $20 diagnostic fee, and recommended an unnecessary $60 tuneup.

Appendix B

> In the third test, a reporter took a Bobcat mower in good working condition to Turf. Again, the spark plug clamp was pulled loose so the machine wouldn't start.
>
> Turf kept the machine four weeks and charged $63 for a tuneup. A Turf mechanic said he rebuilt the carburetor and installed new points. But the mower has a solid-state ignition: It has no points.

Earlier in the article, Locklin described Gloria's response when Gloria agreed to an interview with him and his investigative researcher, Mary DeMarco. When Gloria was told about the results of The Record tests, Locklin wrote Gloria confessed that "his quality controls slipped this year because he was heavily involved in other investments and politics." Locklin quoted Gloria as saying: " 'had my fingers in so many pots that they were getting burned.' " Locklin had referred to Gloria's potential involvement in "revolutionizing" the lawn mower repair industry earlier in the article.

In addition to detailing Gloria's political work for then-presidential candidate Jack Kemp, Locklin also highlighted earlier in the article some inspirational elements of Gloria's success story.

> His father is a postman, and his mother is a waitress. He grew up in New Milford, a few blocks from the [Turf] mower shop. He got a job there when he was 14. By the time he graduated from Ramapo College at age 20, he was managing the place. Gloria had planned

> to go to law school, but Bob Engel, the mower shop owner, offered to sell the business. Gloria went for it.

At the beginning of the article, Locklin emphasized the Small Business Administration's selection of Gloria as New Jersey's young entrepreneur of 1986.

In a sub-article, Locklin explained his method, logic, and results of the loose-spark-plug test conducted at Turf and at eleven other shops on one occasion. Of the twelve, six shops identified the rigged problem, Turf and five other shops did not. Locklin characterized the test as "Bozo-with-a- mower." In that sub-article Locklin concluded:

> A reporter took the same machine to Turf Lawn Mower Repair in Teaneck and told the same story. Turf said the mower probably needed a tuneup. The reporter left the mower. Four weeks later, the mower was ready, its spark plug cap in place. The bill was $63.

II

On January 10, 1989, on his own behalf and on behalf of Turf, Gloria, acting as president and sole stockholder of Turf, filed a three-count complaint against The Bergen Record Corporation, which publishes The Record and The Sunday Record newspapers; David Hall, editor; Byron Campbell, publisher; Bruce Locklin, Investigative News Editor; and Mary Anne DeMarco, investigative researcher. In that complaint plaintiffs alleged that defendants had maliciously published a news article about plaintiffs (count one — libel); that Mark

Appendix B

Winners, Robert Vroeginday, and Douglas Livingston (Turf's former employees) had given false and malicious statements to defendants to injure plaintiffs' good name (count two — slander); and that because of the tortious conduct of defendants and former Turf employees, plaintiffs had suffered the loss of prospective customers and income and Gloria had suffered mental anxiety, emotional distress, and embarrassment (count three — intentional interference with prospective business advantage). In August of 1990, plaintiffs also filed a complaint against a competitor in the business, Edward Mitchell doing business as Eddie's Power Equipment (Mitchell), claiming that Mitchell had cooperated with Locklin in gathering information that had appeared in The Record article to destroy plaintiffs' business. All claims against the former Turf employees were dismissed later by consent.

After extensive discovery, defendants and Mitchell moved for summary judgment, which the trial court granted. Mitchell's motion is not before us. In granting defendants' motion, the trial court held:

> For the purposes of summary judgment, this court accepts plaintiff's version of any contradicted facts. This court accepts that in retrospect the tests were unfair, the informants biased, and the questions loaded. Nevertheless, the comments of each individual to Bruce Locklin were highly detailed and cumulatively very similar. There was no allegation of deliberate knowledge of falsehood but of reckless disregard.

The trial court applied the actual-malice standard because

plaintiffs had conceded its applicability. Although concluding that plaintiffs had failed to establish actual malice, the trial court stated:

> Here, although the methods employed may have been negligent or even grossly negligent, the notes and interviews of Locklin are sufficiently detailed and cumulatively are specific and corroborative.
>
> This court is mindful of the article's detrimental impact on plaintiff. Viewed from the perspective of the justice system, plaintiff did not get a fair trial before the verdict of Locklin was published in The Record. Yet, this court must be mindful of the importance of a free press to our society and the reasons underlying the tremendously difficult standard imposed by our Supreme Court in defamation cases.
>
> Plaintiff fails to raise a genuine issue of actual malice and summary judgment is granted.

The Appellate Division affirmed the trial court's grant of summary judgment to defendants. 269 N.J.Super. 370, 635 A.2d 575 (1994). A majority of that court found that the sale and repair of lawn mowers is "a subject of legitimate public interest." Id. at 376, 635 A.2d 575. The court found no difference between a business that provides goods and one that provides services. Ibid. The concurring judge affirmed the trial court because she concluded, as had the trial court, that plaintiffs had conceded the applicability of the actual-malice standard. Thus, the concurring

judge found it "unnecessary to decide whether [petitioners'] business involving the sale and repair of lawn mowers is a matter of legitimate public interest." Id. at 380, 635 A.2d 575. (Wefing, J.A.D., t/a, concurring). We granted plaintiffs' petition for certification. 136 N.J. 30, 641 A.2d 1041 (1994).

III

We first address whether actual malice is the appropriate standard of proof in defamation actions involving any business whose activities are the subject of a newspaper article. The majority of the Appellate Division held that the actual-malice standard applies because "any person or business which opens itself to the general public thereby subjects itself to the scrutiny that naturally comes with the attention it seeks, and thus creates a subject of legitimate public interest." 269 N.J.Super. at 376, Plaintiffs contend, however, that the imposition of the actual-malice standard of liability is inappropriate. To subject the local shoemaker, corner newspaper stand owner, and other similarly situated business owners to such a heightened standard of proof places an impossible burden on them. Most local businesses and their owners do not voluntarily thrust themselves into public controversy merely by opening a business. Nor do they have the prominence or financial ability to present their cases effectively to the public if unfairly or falsely attacked by the media. Defendants, however, contend that imposition of the actual-malice standard is needed to protect the free flow of information.

An examination of the law of defamation discloses that such a broad privilege is unnecessary and strikes an improper balance between the public's interest in preserving an uninhibited, robust, and free press and in protecting the good name and reputation of a business and its owner. Reviewing the public-policy

considerations behind the actual-malice standard demonstrates that courts should not impose it on every business. Nor will the failure to apply the higher standard of actual malice on such businesses have a chilling effect on the press.

For years most state defamation laws gave redress to a defamed private person for proving only that a false publication subjected "him to hatred, contempt, or ridicule." See Gertz v. Welch, Inc. 418 U.S. 323, 370, 94 S.Ct. 2997, 3022, 41 L.Ed.2d 789, 822 (1974) (White, J., dissenting). In New York Times Co. v. Sullivan, (New York Times), however, the United States Supreme Court placed limits on state defamation law and developed the actual-malice standard for recovery by public officials. 376 U.S. 254, 279-280, 84 S.Ct. 710, 725-726, 11 L.Ed.2d 686, 706 (1964). Extending that standard to public figures three years later, the Court in Curtis Publishing Co. v. Butts also extended the privilege to defendants who write or report on non-public or private persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large," 388 U.S. 130, 164, 87 S.Ct. 1975, 1996, 18 L.Ed.2d 1094, 1116 (1967) (Warren, C.J., concurring). Hence, the genesis of "public concern" in First Amendment law.

In Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), a plurality of the Court further extended the New York Times standard to all libel actions, regardless of a plaintiff's status, so long as the defamatory statement relates to matters of "public or general interest." Three years later, the Court, realizing that it had extended the requirement of actual malice too far, repudiated Rosenbloom's "public or general interest test" for private persons. Gertz, supra, 418 U.S. at 346, 94 S.Ct. at 3010, 41 L.Ed.2d at 809. The Supreme

Court recognized that because private persons lack "access to the channels of effective communication . . . to counteract false statements" and because they have "relinquished no part of [their] good name[s]" by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," private persons are entitled to greater protection than public persons. Id. at 344-45, 94 S.Ct. at 3009, 41 L.Ed.2d at 808.

The Court concluded that "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." Id. at 343, 94 S.Ct. at 3008-3009, 41 L.Ed.2d at 807. Thus, Gertz made it clear that the federal constitution does not require "private persons" to demonstrate actual malice before they can prevail in a defamation suit against a media defendant even if the matter is one of legitimate public concern. Nevertheless, Gertz continued to allow each state to define its own appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private person. Id. at 347, 94 S.Ct. at 3010-3011, 41 L.Ed.2d at 809.

However, the Gertz Court did provide certain safeguards for the press. First, the Court held that a state could not impose liability without requiring some showing of fault. Ibid. Second, the Court held that a state could not permit recovery of presumed or punitive damages on a showing of less than actual malice. Id. at 349, 94 S.Ct. at 3011-3012, 41 L.Ed.2d at 810. The Court later imposed on private-figure plaintiffs "the burden of showing falsity as well as fault before recovering damages." Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776, 106 S.Ct. 1558, 1563, 89 L.Ed.2d 783, 792 (1986). Moreover, as an additional protection " 'in cases raising irst Amendment issues . . . appellate

court[s] must .... make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " Milkovich v. Lorain J. Co., 497 U.S. 1, 17, 110 S.Ct. 2695, 2705, 111 L.Ed.2d 1, 17 (1990) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502, 515 (1984) (quoting New York Times, supra, 376 U.S. at 284-86, 84 S.Ct. at 728, 11 L.Ed.2d at 709) (omission in original)). The Court also recognized that ample constitutional safeguards protect the press adequately, and therefore concluded that establishing another First Amendment protection for defamatory statements made by the media was unnecessary. Id. at 19, 110 S.Ct. at 2706, 111 L.Ed.2d at 18 (holding that statements categorized as "opinion" as opposed to "fact" are not exempt from defamation claim).

IV

Although each state might formulate slight variations, forty-two jurisdictions in the United States[1] hold that negligence is the standard for private plaintiffs to recover against a media defendant even when the subject matter of the speech is of public

---

1. The negligence standard prevails in thirty-eight states, the District of Columbia, and three other United States jurisdictions. Mead Corp. v. Hicks, 448 So.2d 308 (D.Ala.1983); Sisemore v. U.S. News & World Report, Inc., 662 F.Supp. 1529, 1535 (D.Alaska 1987) (court presumed that the Alaska Supreme Court would now follow the rule that is "apparently sound and increasingly dominant in other jurisdictions" that actual malice does not apply to comment on matters of public concern unless plaintiff is a public figure, and the Alaska Supreme Court followed District Court's lead in Moffatt v. Brown, 751 P.2d 939 (1988) in effect overruling Gay v. Williams, 486 F.Supp. 12 (D.Alaska 1979)); Peagler v. Phoenix News., Inc., 114 Ariz. 309, 560 P.2d 1216 (1977); Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840 (1979), cert. denied, 100 S.Ct. 1024 (1980), 281 Ark. 25, 660 S.W.2d

(Cont'd)

Appendix B

(Cont'd)

933 (1983); Brown v. Kelly Broadcasting Co., 48 Cal.3d 711, 257 Cal.Rptr. 708, 771 P.2d 406 (1989); Miles v. Perry, 11 Conn.App. 584, 529 A.2d 199 (1987); R. Re v. Gannett Co. Inc., 480 A.2d 662 (Del.1984), aff'd 496 A.2d 553 (Del.1985); Phillips v. Evening Star News, Co., 424 A.2d 78 (D.C.App.1980), cert. denied, 451 U.S. 989, 101 S.Ct. 2327, 68 L.Ed.2d 848 (1981); Miami Herald Publishing Co. v. Ane, 58 So.2d 239 (Fla.1984); Triangle Publications v. Chumley, 253 Ga. 179, 317 S.E.2d 534 (1984); Porter v. Guam Publications, Inc., 643 F.2d 615 (9th Cir. interpreting law of Guam) cert. denied 454 U.S. 940, 102 S.Ct. 475, 70 L.Ed.2d 247 (1981); Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975); Wiemer v. Rankin, 117 Idaho 566, 790 P.2d 347 (1990); Rosner v. Field Enter., Inc., 205 Ill.App.3d 769, 151 Ill.Dec. 154, 564 N.E.2d 131 (1990) (held actual malice standard does not apply to action by private individual, a podiatrist, against media defendants, even though series of articles on accident and medical insurance fraud involved matter of public concern or general interest); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky.1981), cert. denied 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed.2d 849 (1982); Wilson v. Capital City Press, 315 So.2d 393 (La.Ct.App.), cert. denied, 320 So.2d 203 (La.1975); General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810 (1976); Stone v. Essex Cty. News., 367 Mass. 849, 330 N.E.2d 161 (1975); Rouch v. Enquirer & News of Battle Creek, 427 Mich. 157, 398 N.W.2d 245 (1986); Jadwin v. Minneapolis Star and Tribune Co., 367 N.W.2d 476 (Minn.1985); Newson v. Henry, 443 So.2d 817 (Miss.1984); McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493 (1981); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982); Walters v. Sanford Herald, 31 N.C.App. 233, 228 S.E.2d 766 (1976); Landsdowne v. Beacon J. Publishing Co., 32 Ohio St.3d 176, 512 N.E.2d 979 (1987); Martin v. Griffin Tele., Inc., 549 P.2d 85 (Okla.1976); Bank of Or. v. Independent News, 65 Or.App. 29, 670 P.2d 616 (1983); Mathis v. Phila. News., 455 F.Supp. 406 (E.D.Pa.1978); Torres-Silva v. El Mundo, 106 P.R.Dec. 15 (P.R.1977); De Carvalho v. Da Silva, 414 A.2d 806 (R.I.1980); Jones v. Sun Publishing Co., 278 S.C. 12, 292 S.E.2d 23, cert. denied 459 U.S. 944, 103 S.Ct. 258, 74 L.Ed.2d 201 (1982); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn.1978); Foster v. Laredo News., Inc., 541 S.W.2d 809 (Tex.1976), cert. denied 429 U.S. 1123, 97 S.Ct. 1160, 57 L.Ed.2d 573 (1977); Seegmiller v. K.S.L., Inc., 626 P.2d 968 (Utah 1981); Colombo v. Times-Argus Ass'n, 135 Vt. 454, 380 A.2d 80 (1977); Gazette, Inc. v. Harris, 229 Va. 1, 325

(Cont'd)

concern. That choice of standard is significant because it supports our finding that the failure to impose the actual-malice standard in every defamation action involving a business product or service will not have a chilling effect on the press. Neither amicus curiae, the New Jersey Press Association, nor defendants have presented any evidence to the contrary.

Given the size and variety of the foregoing authority, we are unable to delineate each state's nuances in imposing such a negligence standard. However, we discuss the standard in

---

(Cont'd)

S.E.2d 713 (1985); Ali v. Daily News Publishing Co., 540 F.Supp. 142 (V.I.1982); Caruso v. Local Union No. 690, 100 Wash.2d 343, 670 P.2d 240 (1983); Crump v. Beckley News., Inc., 173 W.Va. 699, 320 S.E.2d 70 (1984); Denny v. Mertz, 106 Wis.2d 636, 318 N.W.2d 141 cert. denied 459 U.S. 883, 103 S.Ct. 179, 74 L.Ed.2d 147 (1982); Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo.1976).

In addition, seven United States jurisdictions have not considered this issue. However, four of those jurisdictions have adopted an actual-malice standard applicable only to a public official and a matter of public concern that signals that the standard of actual malice would not be adopted when a private person is involved. See Nazieri v. Miss. Valley College, 860 S.W.2d 303, 314 (Mo.1993) (en banc); Hoch v. Prokop, 244 Neb. 443, 507 N.W.2d 626, 629 (1993); Nev. Ind. Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337, 344 (1983); Nelson v. Web Water Devel. Ass'n, Inc., 507 N.W.2d 691, 697 (S.D.1993); and see also Lence v. Hagadone Inv. Co., 258 Mont. 433 853 P.2d 1230, 1237 (1993) (in deciding emotional distress claims arising from a libel suit, court distinguished plaintiff as a "private person", rather than "a public figure subject to an 'actual malice' standard").

The New York courts have adopted an intermediate "gross irresponsibility" standard. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975); Gaeta v. N.Y. Times, Inc., 62 N.Y.2d 340, 477 N.Y.S.2d 82, 465 N.E.2d 802 (1984).

California because its seminal case is so factually similar to this case. In Brown v. Kelly Broadcasting Co., 48 Cal.3d 711, 257 Cal.Rptr. 708, 736-737, 771 P.2d 406, 435 (1989), the California Supreme Court held that a state statute did not contain a broad public-interest privilege for the television station that had televised consumer affairs' reports critical of a local home contractor. To mend the damage to her professional reputation, the contractor sought a retraction from the broadcasting company and an investigation from the Contractor's State License Board. Id. 257 Cal.Rptr. at 711, 771 P.2d at 409. The broadcasting company refused to retract the allegations made by the homeowner on its televised programs and claimed that it had given the contractor an opportunity to defend herself on its second broadcast, but she had refused to do so. Ibid. The Contractor's State License Board refused to undertake an investigation to help the contractor because it found no factual support for the homeowner's televised allegations against the contractor. Ibid. At trial, the broadcasting company won summary judgment by claiming that it enjoyed a privilege under the California statute as well as federal law, which allowed it to publish any story in the public interest about a private person, regardless of its libelous or slanderous effects, so long as it did not do so with malice. Id. at 711-12, 771 P.2d at 409-10. The California Court of Appeals affirmed this privilege, but found sufficient evidence to question whether the broadcasting company had acted with malice. Id. at 711, 771 P.2d at 410.

Relying on its own statutory interpretation and law developed by the United States Supreme Court, the California Supreme Court rejected the privilege sought by the media. The Brown court also noted the following public policy considerations underlying its decision. First, it found that "the breadth of the privilege sought by defendants is difficult to

overstate." Id. at 725, 771 P.2d at 423. It "would be so broad that it would apply to almost every defamatory communication . . . [so that] the media in every defamation action would . . . argue that the communication was a matter of public interest." Id. at 715, 725, 771 P.2d at 413, 423. Second, noting the overwhelming weight of authority from other states and the Restatement (Second) of Torts, § 580B (1989), which adopted the negligence standard, the Brown court saw no reason to "deny California citizens protection for their reputation equal to that provided in other states." Id. at 727, 771 P.2d at 425. Third, the court recognized the importance of a private person's reputation, and remembered that " 'the defamation action, properly limited, also plays an important role in a free society as it represents the individual's sole remedy against the occasional excesses of the print and electronic media which often have vast resources to inflict untoward damage upon an individual.' " Ibid. (quoting Miami Herald [Publishing Co. v. Ane], supra, 423 So.2d [376] at 387 [(Fla.App.1982)]). Fourth, the Brown court recognized the substantial constitutional protections that exist for the news media. Id. 257 Cal.Rptr. at 730-31, 771 P.2d at 428-29. Fifth, the court saw no need to expand the privilege of the media because the negligence standard is not a standard of strict liability, and a journalist need act only with reasonable care to avoid liability under a negligence standard. Id. at 732, 771 P.2d at 430. Sixth, the defendant did not show that the "free flow of information has been restricted even in the slightest degree in the overwhelming number of states that has adopted a negligence standard." Ibid. Finally, the press can always correct its error. Id. at 733, 771 P.2d at 431. For all those reasons, the California Supreme Court found the negligence standard is appropriate for private plaintiffs who have been defamed through a story that the media considers of public concern. Id. at 725, 771 P.2d at 423.

Appendix B

Currently, only three jurisdictions use the actual-malice standard in defamation actions brought by private persons: Colorado, Indiana, and our own state. Commentators explain those three deviations from the majority of states as acceptance of Justice Brennan's reasoning in Rosenbloom, supra, that the public nature of the disputed statement, rather than the public status of the plaintiff, should trigger the standard of actual malice. Ronald Smolla, Law of Defamation, 3-28 (1988). However, as we previously explained, that reasoning has been repudiated by the Supreme Court in Gertz and is not followed in most states. Indeed, federal courts have cast doubt on the wisdom in both Colorado and Indiana of applying the actual-malice standard so broadly. See Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 526-29 (10th Cir.1987) (quoting Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315, 319 (Colo.1981)) (hinting that the Colorado Supreme Court has misplaced the actual-malice standard developed for " 'good faith critics of public officials' "; see supra note 1 (noting that federal court convinced the Alaska Supreme Court to lower its standard to negligence).

Judges in both Indiana state and federal courts have noted the lack of acceptance of Indiana's standard and reasoning but have refused to abandon the standard because the Supreme Court of Indiana has not expressed disapproval of it. Jean v. Dugan, 20 F.3d 255, 262 (7th Cir.1994); Chang v. Michiana Telecasting Corp., 900 F.2d 1085, 1087-88 (7th Cir.1990).

V

The law of New Jersey parallels the complex, yet ever-changing, law of defamation in both federal and other state courts. As we have stated previously, "The evolution of the law of

defamation reflects the tension between society's competing interests in encouraging the free flow of information about matters of public concern and in protecting an individual's reputation." Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 135-36, 516 A.2d 220 (1986).

We are committed to the principle that debate on public issues should be uninhibited, robust, and wide open. Sisler v. Gannett Co., 104 N.J. 256, 266, 516 A.2d 1083 (1986); see Dairy Stores, supra, 104 N.J. at 138, 516 A.2d 220. However, we have also recognized that " '[t]he law of defamation embodies the important public policy that individuals should generally be free to enjoy their reputations unimpaired by false and defamatory attacks.' " Costello v. Ocean County Observer, 136 N.J. 594, 606, 643 A.2d 1012 (1994) (quoting Swede v. Passaic Daily News, 30 N.J. 320, 331, 153 A.2d 36 (1959)).

To balance these public policy considerations, the jurisprudence developed by this Court has followed the United States Supreme Court's delineation of the class of defamation plaintiffs into public or private figures. In Sisler, supra, we termed this balancing test one between the "warring interests of free speech and individual reputation." 104 N.J. at 265, 516 A.2d 1083. As in many federal cases since Gertz, the designation of an individual plaintiff as a public or private figure became the critical determination in many defamation actions. E.g., Costello, supra, 136 N.J. at 612-14, 643 A.2d 1012; Sisler, supra, 104 N.J. at 269-70, 516 A.2d 1083. Underlying that ocus was "the idea that individuals who have knowingly and voluntarily exposed themselves to public commentary can more fairly be required to shoulder a heavier burden of proof in order to establish actionable defamation."Sisler, supra, 104 N.J. at 265, 516 A.2d 1083.

Appendix B

After Gertz, the Supreme Court noted that the type of speech does have relevance, for it is speech on matters of public concern that is at the heart of the First Amendment's protection. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59, 105 S.Ct. 2939, 2944-45, 86 L.Ed.2d 593, 602-03 (1985). Thus, to accompany our delineation of defamation plaintiffs, this Court also developed a classification for the subject matter of the speech involved based on public policy considerations. That classification for defamation actions is the heart of the controversy before us. Following New York Times, supra, we sought to protect speech that relates to a matter of legitimate public concern because of " 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " Kotlikoff v. The Community News, 89 N.J. 62, 73, 444 A.2d 1086 (1982) (quoting New York Times, supra, 376 U.S. at 270, 84 S.Ct. at 721, 11 L.Ed.2d at 701). However, we also found speech not pertaining to matters of public concern as resting "more lightly on the free speech/ reputation interest scale." Sisler, supra, 104 N.J. at 266, 516 A.2d 1083.

In Dairy Stores and Sisler, we constructed a test to reflect public policy considerations often ignored in other states. See 104 N.J. at 141-46, 516 A.2d 220; 104 N.J. at 279, 516 A.2d 1083. In those cases we sought to protect speech that affects the health and safety of the citizenry, or involves a highly regulated industry. However, a close reading of Dairy Stores and Sisler discloses that we never intended to extend the heightened standard of actual malice to all consumer investigative reporting. In Dairy Stores, we extended the heightened standard of proof only to defamatory communications regarding activities that affect the public interest. The Court recognized

> that not everything that is newsworthy is a matter of legitimate public concern, and that sorting such matters from those of a more private nature may be difficult. . . .
>
> Some courts have developed criteria for determining whether the activities and products of corporations constitute matters of public interest. As previously indicated, matters of public interest include such essentials of life as food and water. Widespread effects of a product are yet another indicator that statements about the product are in the public interest. Still another criterion is substantial government regulations of business activities and products.

[Id. at 144-45, 516 A.2d 220 (citations omitted).]

Because the bottling and selling of drinking water was regulated by the State of New Jersey and drinking water was an essential of life, we held in Dairy Stores that the subject matter of the newspapers' articles, drinking water, was a legitimate concern of the public because of the long history of this state's regulation in that area. Id. at 145, 516 A.2d 220. However, this Court correctly reserved for another day the task of developing "a more complete definition of legitimate concerns of the public." Ibid.

Nor does Sisler support defendants' position. Sisler involved a retired banker who had loans from a bank of which he had been the founder and former president. A newspaper

published a story asserting that the banker had received under collateralized loans from the bank to finance his horse farm. Suing in defamation, the banker argued that he was a private person and that an ordinary-negligence standard governed. Employing a negligence standard, a jury returned a substantial verdict in his favor. Although we agreed that the plaintiff was neither a public figure nor a limited public figure, we nonetheless vacated the award, holding that an actual-malice standard should govern. We reasoned:

> Plaintiff founded [the bank], and served as its President and Director for almost twenty years. He was therefore undoubtedly thoroughly and intimately conversant with all of the public and governmental interests that attend the banking industry. Plaintiff would know of course that banks are regularly examined and audited. Moreover, the transaction itself was fraught with public implications. Plaintiff received a large loan from [the bank], secured by a mortgage; this occurred shortly after his retirement from official bank positions. Most people in the business and commercial world would expect that a large loan between a bank and its founder and former president would attract special scrutiny and examination. See N.J.S.A. 17:9A-72 (special guidelines for loans to bank directors or executive officers).
>
> [104 N.J. at 275, 516 A.2d 1083.]

Based on this factual scenario, we held that:

> when a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity, defamatory speech that focuses upon that public interest will not be actionable unless it has been published with actual malice.

[Id. at 279, 516 A.2d 1083.]

However, we noted that

> our precedents have not totally subjugated the individual's interest in the name of free speech. For instance, the fair comment privilege, which at common law protected opinion on topics of public concern, also took into account individual fairness. Implicit in the determination of what was a matter of legitimate public concern for purposes of accrual of the fair comment privilege was a fairness assessment based on the voluntariness or expectation of exposure and publicity

[Id. at 272, 516 A.2d 1083.]

Both Dairy Stores and Sisler involved business activities that intrinsically implicated important public interests, a matter of public health—the sale of such an essential of life as bottled

water — and an industry heavily regulated by the government — banks. We continue to apply the actual-malice standard to businesses that are of such inherent public concern. However, we do not find the actual-malice standard appropriate or necessary with regard to businesses like the sale and repair of lawn mowers, the repair of shoes, the cleaning of clothes, and numerous other local businesses that involve everyday products or services that do not intrinsically involve a legitimate public interest.

Like federal law and the vast majority of state law, the defamation law of our state holds the media responsible for libelous or defamatory statements about private citizens. Statements made by the media about public figures are treated differently from those of private citizens. Private persons are defined by their failure to thrust themselves voluntarily into the public limelight and by their inability to respond to criticism of them in the media. We find most ordinary businesses and their owners are like private persons, and therefore, generally, the defamation rules we apply to private persons are equally applicable to them.

Many businesses are sole proprietorships or small individually-owned stores, like a local "mom and pop" stationery store, shoemaker, tailor, cleaner, or barber. Although those stores are important in the daily life of their communities, their owners are not "public figures." Nor do their activities involve "matters of public concern" that the United States Supreme Court and the vast majority of federal and state courts have made subject to the heightened actual-malice standard of proof. Neither the public nor the owners of those ordinary businesses see the owners in the vortex of a public controversy by selling their product or service to the public. Nor does our opinion change because those businesses do limited advertising. Most businesses do advertise

if only in a local shopping flyer, to attract customers and to succeed. Such advertising is insufficient to thrust the business or its owner into the public spotlight.

Moreover, most of those businesses and their owners have neither the financial resources nor "access to the channels of effective communication . . . to counteract false statements" to protect their business and their livelihood from a defamatory newspaper report. Gertz, supra, 418 U.S. at 344, 94 S.Ct. at 3009, 41 L.Ed.2d at 808. They are neither traditional 'public figures' nor do they engage in activities that constitute traditional matters of public concern. Therefore, in respect of such prosaic and innocuous everyday businesses, we conclude that the negligence standard best balances the interests of the public in preserving an uninhibited, robust, and free press and the interests of a private individual and a business in preserving their reputation and good name.

The public does, however, have a legitimate interest in any business charged with criminal fraud, a substantial regulatory violation, or consumer fraud that raises a matter of legitimate public concern. When the media addresses those issues of legitimate and compelling public concern, the actual-malice standard of proof will apply, regardless of the type of business involved. In so ruling, we seek a balance between a private person's right of privacy and the public's right to know of various dangers in our society.

Here, we find that the sale and repair of lawn mowers is a business that normally would trigger the negligence standard. Certainly, the operations of a lawn-mower-repair shop are unregulated and do not impact on any of the "essentials of life." And the factors that motivated us in Sisler to apply the

heightened-proof standard are plainly missing from this case. The simple business of lawn-mower repair is not imbued "with all of the public and governmental interests that attend the banking industry." Sisler, supra, 104 N.J. at 275, 516 A.2d 1083. In addition, lawn-mower-repair shops are not "regularly examined and audited" by any regulatory agency. Ibid. Accordingly, unless the acts alleged by The Record constitute consumer fraud that concern a matter of legitimate public interest, the negligence standard will apply.

VI

The New Jersey Legislature has enacted a statute that aims to protect consumers from fraud in the sale or advertisement of merchandise, New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -48 (the Act). First enacted in 1960, the Legislature has frequently amended the statute to " 'give New Jersey one of the strongest consumer protection laws in the nation.' " Cox v. Sears Roebuck & Co., 138 N.J. 2, 15, 647 A.2d 454 (1994) (quoting Governor's Press Release for Assembly Bill No. 2402, at 1 (Apr. 19, 1971)). The focus of the Act is the activity of a corporation that constitutes an "unlawful practice." For example, N.J.S.A. 56:8-2, dealing with fraud in connection with sale or advertisements by merchants, reads:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such . . . whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. . . .

Appendix B

"[T]he phrase 'unconscionable commercial practice' is not defined in the Act. Acknowledging that 'unconscionability' is an 'amorphous concept obviously designed to establish a broad business ethic,' we have defined the term as '[t]he standard of conduct contemplat[ing] * * * good faith, honesty in fact and observance of fair dealing.' " Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 472, 541 A.2d 1063 (1988) (quoting Kugler v. Romain, 58 N.J. 522, 544, 279 A.2d 640 (1971)).

In Cox, we also determined that to violate the Act a "person must commit an unlawful practice" under the Act which we found fell "into three general categories: affirmative acts, knowing omissions, and regulation violations." Cox, supra, 138 N.J. at 17, 647 A.2d 454. The "capacity to mislead, however, is the prime ingredient of all types of consumer fraud." Ibid.

Hyland v. Zuback, 146 N.J. Super. 407, 370 A.2d 20 (App. Div. 1976), presents an instructive example of consumer fraud. There, the owner of a small pleasure boat complained to the Attorney General about the owner of a business who hauled, repaired, and stored motorboats. Id. at 409, 370 A.2d 20. The original agreement between the consumer and the business owner was for work on the boat that would cost $50 and would be finished within a few days. Ibid. Several weeks later, the business owner phoned the consumer and urged him to agree to replacement of an additional part. The consumer refused. At that time the business owner assured the consumer that "the job was progressing as planned . . . [and] assured him that everything was fine and that he need not worry." Id. at 414, 370 A.2d 20. Over one month after the parties had contracted, the business owner presented the consumer with a bill for $468. The business owner had not consulted the consumer about the substantial increase. Id. at 412, 370 A.2d 20. At the time of pick-up, the business

owner threatened the consumer that if he did not pay the increased bill, he would keep the boat in storage and continue to charge him for such storage. In addition to the increased cost, the consumer's complaint at the time of pick-up and payment was that a part specified to be fixed in the original contract had not been replaced. The business owner testified that the part did not need replacement. Ibid. The consumer later discovered that his boat was inoperable, and he spent an additional $300 and several months returning his boat to operating condition. Id. at 413.

The Appellate Division found the cost overrun an unconscionable practice that was an "act of a quality which the Legislature sought to suppress" in enacting N.J.S.A. 56:8-2. Id. at 414, 370 A.2d 20. Moreover, the business owner's "practice" of lulling the consumer into a false sense of security during the extended work with its increased cost as well as his practice of presenting the consumer with an ultimatum when the consumer went to retrieve his boat was more than "mere omission"; such practice constituted deception and misrepresentation. Id. at 415, 370 A.2d 20. See also Levin v. Lewis, 179 N.J.Super. 193, 431 A.2d 157 (App.Div.1981) (finding violation of Consumer Fraud Act where two consumers each originally given a firm price for completion of work were subsequently billed more than twice the original price).

The series of business dealings in Hyland and Levin constituted consumer fraud. If the media publicized those activities, the actual-malice standard would apply, as it would for media coverage on highly regulated industries or businesses whose activities concern health and safety.

VII

No hard and fast rules exist to determine whether alleged

consumer fraud conduct reported in a newspaper article raises a matter of public concern sufficient to trigger the actual-malice standard. What constitutes consumer fraud depends not on the manner of investigation employed by the media to capture the story, but generally on whether the alleged activities of the business would constitute a cause of action under the Consumer Fraud Act. Moreover, the article must deal primarily with consumer fraud viewed as a whole in light of all surrounding circumstances. If the court determines that substantially all the allegations set forth in the article, if true, would support a consumer fraud complaint, then the actual-malice standard will apply.

The Act and our own jurisprudence provide a plethora of examples of what does or does not amount to consumer fraud. Mere puffery does not constitute consumer fraud. Nor does charging five or five-hundred dollars more for an item than the price charged by a nearby competitor amount to consumer fraud. Usually, consumer fraud involves a pattern of repetitive conduct, not separate incidents. Minor disagreements between consumer and business owner over quality of customer service, timing of service, or increased price is not consumer fraud. To constitute consumer fraud sufficient to trigger the actual- malice standard, the business practice in question must be "misleading" and stand outside the norm of reasonable business practice in that it will victimize the average consumer, and thus most clearly and directly involve a matter of legitimate public concern. The conduct of the business owners in Levin, supra, 179 N.J. Super. 193, 431 A.2d 157 and Hyland, supra, 146 N.J. Super. at 409, 370 A.2d 20, supra at 413-415, 655 A.2d at 428- 30, are examples of such egregious business practices.

Our standard recognizes a distinction between consumer

fraud and mere customer dissatisfaction. We thereby seek to accommodate the need of the public to learn of highly suspect business practices that clearly implicate matters of public concern, and the vulnerable position of the business owner whose mechanic fixes three problems when a car has four problems, or whose sales assistant is grumpy and less than helpful to a customer who requires immediate service. That business owner may not run the best business in the area, but the owner is not guilty of consumer fraud. And if a media report defames a business owner's reputation based on grounds that fall short of conduct that violates the Act, that person need prove only negligence on the part of the media defendant.

VIII

In establishing the applicable burden of proof (actual malice vs. negligence), we direct our analysis to whether an article reports a matter of consumer fraud that amounts to a legitimate public concern. We examine the article in its entirety assuming that all its allegations are true. If, drawing all reasonable and normal inferences, the article reads fairly and describes conduct, activities, and events that would lead an average reader to conclude that the owner engaged in business practices that were unconscionable, deceptive, misleading, and reflected bad faith, then the actual-malice standard would be applicable.

However, in drawing the reasonable inferences, we consider the evidence that the plaintiff introduces to show that the article does not set forth consumer fraud conduct that would constitute a violation of the Act. Turf vigorously opposed the motion for summary judgment. There was extensive discovery. Numerous and voluminous depositions, affidavits, supplemental affidavits, and experts' reports, together with tapes and transcripts of tapes,

were filed. In determining whether plaintiff has introduced sufficient evidence to show that the article fails to set forth acts of consumer fraud that raise matters of legitimate public concern, the reporter's conduct is irrelevant. Rather, we focus on Turf's actions. Thus, our examination of the record is similar to that undertaken by the Supreme Court in Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) (holding actual-malice standard not applicable because a wealthy Palm Beach socialite's involvement in a much-publicized divorce did not make her a public figure) and Gertz, supra, 418 U.S. at 344-45, 94 S.Ct. at 3009, 41 L.Ed.2d at 808 (limiting the applicability of the actual-malice standard to "public figures" and "public officials" who had "thrust themselves to the forefront of particular public controversies."), and by this Court in Sisler, supra, 104 N.J. at 268-70, 516 A.2d 1083 (applying actual-malice standard to newspaper article about a former bank president that concerned a matter of legitimate public interest).

IX

With those principles in mind, we consider whether Turf's actions, as set forth in the article, would constitute an "unlawful practice" under the Act. Generally, conduct of a business that is alleged to be consumer fraud but does not constitute a violation of the Act will not be deemed to raise a matter of legitimate public concern that would trigger use of the actual-malice standard.

To support The Record's allegations, Locklin reported that an investigation of the Better Business Bureau's records produced five complaints against Turf during Gloria's ten-year ownership. Two of those complaints also appeared on the docket in small-claims court. In the article, Locklin quoted Ms. Daglezt, one of the small-claims plaintiffs, as stating "that [a Turf

employee] almost had my fist down his throat. He was so nasty." Locklin interviewed, but did not quote, Doris Green, who had also filed a complaint against Turf in small-claims court. Turf picked up two lawn mowers from her for servicing. She alleges that a Turf employee told her at that time that pick-up and delivery would cost $15. When a Turf employee told her that the second lawn mower was beyond repair, she told him that she wanted it, but a Turf employee explained that it had been disassembled. When Turf delivered the second machine to her at her request, they requested a delivery fee. Because she believed that the machine was still disassembled to some degree and because she "didn't like his attitude," Green, like Daglezt, also sued Turf and Gloria in small-claims court. Both of those complaints were dismissed by the court. We find that neither of those complainants alleged any conduct by Turf that would constitute consumer fraud under the Act.

Locklin also interviewed Ron Broking, a former Turf customer who had complained to the Better Business Bureau. Broking explained to Locklin that Turf had held his lawn mower for weeks, had given him a runaround, and had lied to him, and that after returning to Turf to check on his mower, he had learned that Turf had never touched his mower although the counter person told him that Turf was working on it. Again, while Broking's complaint alleged sloppy business practices, we find that his allegations of Turf's actions would not be sufficient to support a consumer fraud complaint under the Act.

However, the allegations of Mel Clansky, another former Turf customer, who had taken his electric lawn mower to Turf for repair, would support a claim of consumer fraud. Turf charged him $54, and the machine worked "for all of about two minutes and the same thing happened again [machine smoked and

jammed up]." Clansky took the mower to Turf again. Turf kept the machine for four weeks and, according to Clansky, gave him a runaround. Turf told him that fixing it would cost $200 and a new machine would cost $125 to $130. Eventually, Clansky bought a new mower from a different shop. When Clansky asked Turf to return his old mower, Turf told him that the mower was in a different location. Clansky never got his old mower or a refund. He wrote to the Better Business Bureau, which told him that Turf had never responded to prior complaints.

Although Locklin accurately restated in the article his interviews with those who filed Better Business Bureau complaints, all those complaints, except for Clansky's complaint, illustrated only bad employee attitude and discourtesy, sloppy business practices, and poor business judgment. Thus, reliance on such complaints is insufficient to support a claim that Turf violated the Act.

In determining whether an article sets forth matters that would constitute a violation of the Act, courts may consider the various sources for the story. One source for consumer fraud reports might be former employees who could provide useful information about the business practices of their former employers. Nevertheless, if the sole source of an article is a disgruntled, fired employee, or a sole competitor, a court could conclude that that evidence alone would not be sufficient to support an action that a plaintiff's conduct violated the Act.

To support his allegations against Turf of consumer fraud, Locklin interviewed four former employees of Turf. He never disclosed in the article that the former employees had been fired. Locklin's failure to have made it clear in the article that the employees had been fired casts doubt on his use of the former

employees' statements to support the article's allegations of Turf's consumer fraud conduct.

Locklin also interviewed one competitor, Edward Mitchell, the owner of Eddie's Power Equipment, and one of his employees. Mitchell told Locklin that at least twenty times each year customers brought their mowers to him after Turf had worked on them. The customers told Mitchell about the repairs that Turf supposedly had made, and after Mitchell examined the mower, he could tell immediately that Turf had not done what it claimed. The employee alleged that during his employment interview, Gloria had told him, "Look, we put a spark plug in, we change the oil, we sharpen the blade, we hope they run. We charge $40, we don't fix em until they bring them back."

Certainly, the statement of one competitor and his mechanic do not support Locklin's broad assertion that "[m]ost customers who paid for tune- ups got little more than an oil change and a new spark plug—for which they typically were overcharged $20 to $30." Thus, those statements alone would not support a claim that Turf's conduct violated the Act. Nevertheless, they do allege typical consumer fraud conduct, and do offer some corroborative evidence that Turf's alleged conduct constituted consumer fraud.

X

However, Locklin's reporting of Turf's conduct during both the second and third tests is sufficient to support his allegations against Turf of consumer fraud. Such conduct could lead an average reader to conclude that Turf engaged in business practices that were unconscionable, deceptive, misleading, and reflecting bad faith that would constitute a violation of the Act.

Appendix B

In his article, Locklin described in three sentences The Record's second visit to Turf for service. After the first test his assistant, DeMarco, took the same machine back to Turf. This time the spark plug clamp had been disconnected, and DeMarco told the Turf employees that she couldn't get the machine started. Turf kept the machine another three weeks, charged a $20 diagnostic fee, and recommended an unnecessary tuneup. In her notes DeMarco wrote that Locklin had also loosened the on/off switch which prevented the machine from starting. She also wrote that the Turf employee had immediately identified the loosened on/off switch, had informed her of the $20 diagnostic fee, and had advised her to leave the machine so that they could diagnose the problem. After several weeks DeMarco returned to Turf and picked up her lawn mower, which Turf had diagnosed as needing a tune-up and a blade sharpening for $68.49. DeMarco elected not to have the tune-up, paid the $20 diagnostic fee, and left with the mower. When the newly repaired lawn mower was brought in by DeMarco, it was in good working order, except for the loosened on/off switch and disconnected spark plug. Therefore, Turf's assertion that it needed a tune-up and a blade sharpening appeared to be misleading. Thus, Turf's conduct alleged in connection with the second test would be sufficient evidence of a consumer fraud violation.

Likewise, an average reader could conclude that Turf's conduct alleged in connection with the third test was deceptive and misleading. In comparison to the first two visits, The Record's third visit to Turf was quite different. Using a Bob Cat brand lawn mower, Locklin conducted another loose-spark-plug test in which he visited Turf and eleven other shops. Of the twelve, six shops identified the rigged problem, screwed in the loose part, and charged nothing. The sub-article identified these shops as "winners." Five other shops did not identify the problem

immediately and informed Locklin that he would have to leave the rigged lawn mower for a diagnosis or a tune-up. In the sub-article those shops "were judged no verdict tests." In addition, Locklin refused to leave the lawn mower at the other "bad" shops, and received estimates from three of those shops for diagnosis and repair ranging from $35 to $60. One of those three shops was termed "worst of the day" by Locklin in his notes, but was not noted in the article or visited again for tests similar to that conducted at Turf.

The part of the article describing the third test reads:

> In the third test, a reporter took a Bobcat mower in good working condition to Turf. Again, the spark plug clamp was pulled loose so the machine wouldn't start.
>
> Turf kept the machine four weeks and charged $63 for a tuneup. A Turf mechanic said he rebuilt the carburetor and installed new points. But the mower has a solid-state ignition. It has no points.

After leaving the Bob Cat at Turf, Locklin had picked up the machine four weeks later and paid $63 for a tune-up, which included the rebuilding of the carburetor. Locklin questioned why the mower had not started, and the mechanic told him that because he had had a problem starting it he had rebuilt the carburetor and had put in fresh oil, gas, and new points. Locklin checked with three sources and learned that the Bob Cat mower had a solid-state ignition with no points. Accordingly, we find that Turf's rebuilding of the carburetor in a mower that apparently was in good condition and the installation of new points in a

machine that did not need points, in tandem with the second visit, are sufficient to support a claim that Turf committed consumer fraud under the Act.

XI

In the context of a summary judgment motion, whether this record establishes that Turf's alleged conduct could support a cause of action for consumer fraud under the Act is a difficult question. Certainly, Turf's alleged conduct was not as "misleading" or so outside the norms of reasonable business practices as the conduct of the business owners in Levin, supra, 179 N.J.Super. 193, 431 A.2d 157 and Hyland, supra, 146 N.J.Super. at 409, 370 A.2d 20. However, Locklin's second and third tests and Clansky's complaint are evidence of conduct that would support a cause of action for consumer fraud under the Act. Moreover, the evidence from Turf's former employees, the five Better Business Bureau complaints, and the statements of Mitchell and his employee all offer some corroborative evidence of misleading business practices on the part of Turf. Additionally, Locklin did attempt to verify his information by contacting Gloria and taking the Bob Cat to at least 6 shops that found the machine did not need repair. Because defendants' article described sufficient uncontradicted assertions of Turf's conduct that, if true, would be sufficient to support a complaint of consumer fraud under the Act, we find Locklin's article is well grounded in consumer fraud. Therefore, we find that actual malice was the appropriate standard for summary judgment.

XII

We next must consider whether the evidence presented by the plaintiffs for actual malice was sufficient to withstand a

motion for summary judgment. To survive a motion for summary judgment, the plaintiffs must establish by clear and convincing evidence that the defendants published the article either with the knowledge that the statements were false or with reckless disregard of whether they were false. New York Times, supra, 376 U.S. at 279-80, 84 S.Ct. at 726, 11 L.Ed.2d at 706. Thus, the plaintiffs have a very heavy burden in establishing that the defendants published an article with actual malice. See Costello, supra, 136 N.J. at 614-19, 643 A.2d 1012 (explaining the application of actual-malice standard and the heavy burden the plaintiffs face in meeting that burden). Because we determine the applicability of the actual-malice standard in the context of defendants' motion for summary judgment, "we view the facts in the light most favorable to the plaintiff, giving [plaintiff] the benefit of all favorable inferences that may legitimately be drawn from the record." Dairy Stores, supra, 104 N.J. at 135, 516 A.2d 220; accord Kirk v. City of Newark, 109 N.J. 173, 184-85, 536 A.2d 229 (1988). Therefore, we accept plaintiffs' experts' criticisms of Locklin and the other Record staff members' journalistic methods, and their scathing reviews of the improprieties of The Record 's article on Turf.

Professor Hampden H. Smith, III, head of Washington & Lee University's Department of Journalism found the article to be inaccurate and unfair as it "originated in a totally unprofessional way and developed with a completely improper focus on Turf alone." He cited numerous instances in which The Record and its staff members had "failed to follow universally accepted journalistic standards in a number of instances in the preparation of the article. . . ." Professor Smith specifically outlined how the "comparison test" developed by Locklin was not a comparison because other shops were not properly investigated more than once, records of complaints and suits against such shops were not sought, and the tape recorder was selectively used and tapes

selectively destroyed. Also, Locklin had failed to mention that in a ten-year period of business, only five complaints had been filed against Turf and that all had been resolved in Turf's favor. He quoted only one competitor who had an opinion of Turf's business practices, that opinion based upon allegations made by the competitor's customers. In addition, Locklin told his "sources" that he was investigating lawn-mower-repair shops, but his investigation was focused exclusively on Turf and Gloria. Professor Smith posited, "[I]t is theoretically possible that every other repair shop in Bergen County was sued more frequently than Turf. By focusing research solely on Turf, Locklin and DeMarco studiously avoided learning how good or bad Turf's court and complaint records were in comparison with other shops." In addition, Professor Smith criticized Locklin's sources: former employees, rather than current employees. He wrote, "The only people sought out were those quite likely to have negative attitudes and negative information." Professor Smith also noted that Locklin had never attempted to identify any source who might be favorable to plaintiffs. Instead, Locklin corroborated his investigation by interviewing approximately ten sources, each of whom he knew had a bias against Gloria and Turf. Plaintiffs also retained Marilyn Lasher, Ph.D, of Media Analysis & Communications Research. She conducted an extensive review of The Record's consumer-fraud work, the applicable law, as well as the entire judicial record of the case. She concluded that the independent and so-called scientific tests that Locklin had conducted "were devoid of validity, reliability and other requirements of scientific method and experimental design." Even defendants' own expert, Robert W. Greene, then Assistant Managing Editor of New York Newsday, determined that although the tests had been performed in a valid way, they had not been conducted scrupulously. Nevertheless, he concluded that the "readers could decide for themselves . . . what type of conclusions they could draw from the tests."

Appendix B

The record confirms that much of plaintiffs' experts' criticism of the article are justified, particularly their emphasis on the omission of relevant information and reliance on biased sources. To establish actual malice, a plaintiff needs to prove "that the defendant in fact entertained serious doubts about the truth of the statement or that defendant had a subjective awareness of the story's probable falsity." Costello, supra, 136 N.J. at 615, 643 A.2d 1012 (citing Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1089 (3d Cir.1988)). Although we agree with the trial court that Locklin's "methods may have been negligent or even grossly negligent," we find that plaintiffs have failed to prove that Locklin ever doubted that Turf's conduct constituted serious consumer fraud practices. Plaintiffs, therefore, have failed to establish that Locklin demonstrated actual malice in his reporting.

XIII

The need for constant accommodation by the judiciary is among the often-conflicting goals of the First Amendment. An important societal value is at issue—a person's reputation. As Justice Stewart stated in his concurrence in Rosenblatt v. Baer, "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." 383 U.S. 75, 92-94, 86 S.Ct. 669, 679, 15 L.Ed.2d 597, 609 (1966).

We do not fail to consider the chilling effect of defamation actions on the media. We recognize, however, that substantial constitutional protections exist for the press, supra at 403-04, 655 A.2d at 423, and no evidence shows that the free flow of

information has been restricted in the overwhelming number of states that have adopted the negligence standard. Therefore, we hold today that the negligence standard is the most appropriate standard to adopt with regard to businesses involved with an everyday product or service, whose practices do not constitute consumer fraud, impinge on the health and safety of New Jersey's citizenry, or comprise activity within a highly-regulated industry.

By this opinion, we do not diminish the strong protection against the threat of defamation actions that the press has in this State. That protection has assured the public of the free, robust, and uninhibited flow of information on all matters, especially those of public concern. That protection exceeds that imposed by the United States Supreme Court and the vast majority of states (forty-two), supra at 403, 406 n. 1, 655 A.2d at 423-424. In New Jersey we have imposed the actual-malice standard where the press's statement concerns businesses affecting the public's health and safety and businesses that are subject to substantial government regulation. In recognition of the fact that the public benefits from having the press act as a consumer affairs watchdog, today we take a further step: to protect the public interest and the press, we impose an actual-malice standard rather than a negligence standard, even for ordinary businesses, if the consumer fraud allegations in the article, if true, would constitute a violation of the Consumer Fraud Act.

We do not, however, as suggested by the concurrence, close the door to additional press protection, allowing it only if the Act is violated. Although business practices that fall short of consumer fraud will be subject to press scrutiny even when the press has the protection of only a negligence standard, we recognize there may be occasions when such practices are so damaging to the public as to call for the protection of the press

through a malice standard. We are not omniscient and cannot foresee every possible instance when that additional protection for the press would be required in the public interest. Our decision announces a general rule that when the conduct alleged would constitute a cause of action under the Consumer Fraud Act, the actual-malice standard applies.

We recognize the enormous difficulties imposed on plaintiffs seeking to establish actual malice on the part of the press. Costello, supra, 136 N.J. at 615, 643 A.2d 1012. Not only the reputation of many businesses, but also the businesses themselves may be destroyed by the publication of an article. Gloria contends that as a direct result of the false and defamatory statements published by The Record, he subsequently filed for bankruptcy. Like the trial court, we conclude that "[v]iewed from the perspective of the justice system plaintiff did not get a fair trial before the verdict of Locklin was published in The Record." Nevertheless, the importance of the free flow of information to the public about consumer fraud, and the vital role that investigative reporting plays in conveying that information to consumers justifies the imposition of the actual-malice standard to disclosures by the press that substantially concern allegations of consumer fraud.

XIV

We affirm the judgment of the Appellate Division and the trial court's order granting defendants' summary judgment for the reasons expressed in this opinion.

Chief Justice Wilentz and Justices Handler, and Stein join in this opinion. Justice Pollock has filed a separate concurring opinion in which Justice O'Hern joins. Justice Coleman did not participate.

Appendix B

SUPREME COURT OF NEW JERSEY
A-27 September Term 1994

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs-Appellants,

v.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DE MARCO, DAVID HALL, AND BYRON CAMPBELL,

Defendants-Respondents,

and

EDWARD MITCHELL, d/b/a Eddie's Power Equipment, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE and RICHARD ROE, INC.,

Defendants.

POLLOCK, J., concurring.

I agree with the majority that the Bergen Record did not publish either with knowledge that the facts in the subject articles were false or with reckless disregard for the truth or falsity of those facts. Like the majority, therefore, I would affirm the summary judgment for defendants. Unlike the majority, however, I would stop at that point. Beyond that, the majority opinion points in too many directions for me to follow it unquestioningly.

The tenor of the majority opinion is that the media act in the

public interest when writing about conduct that violates the Consumer Fraud Act, N.J.S.A. 56:8- 1 to -60 (the Act). At the outset, however, the majority states that whether conduct constitutes consumer fraud depends not necessarily, "but generally on whether the alleged activities of the business would constitute a cause of action under the Consumer Fraud Act." Ante at 416, 655 A.2d at 429 (emphasis added).

That ambivalence engenders internal inconsistencies in the majority opinion. For example, the majority finds that the public interest does not encompass articles about overcharging, ante at 416, 655 A.2d at 429, and inferior service, ante at 417, 655 A.2d at 430. Yet, it would include "business practices that were unconscionable, deceptive, misleading, and reflecting bad faith. . . ." Ante at 417, 655 A.2d at 430. Overcharging, like inferior service, can be unconscionable, deceptive, misleading, and reflect bad faith.

Fairly read, the majority opinion stands for the proposition that a violation of the Act illustrates, but does not restrict, the terms "public concern" and "public interest." To the extent that the majority recognizes that the Act does not constitute the universe of public concern, I agree.

I believe that the media perform a valuable service both when writing about matters that the Legislature finds contrary to the public interest and in bringing such matters to the attention of the Legislature and the public. Hence, I doubt that the media can discharge that function if they are confined to a legislative definition of the public interest. My concern is that after today, notwithstanding the majority's protests to the contrary, reporting on matters in the public interest will be less "uninhibited, robust, and wide open." Ante at 408, 655 A.2d at 425.

Appendix B

Furthermore, I would temper the majority's concern for the vulnerability of repair people, ante at 417, 655 A.2d at 430, with some concern for the vulnerability of consumers. For me, the analogy of repair people to the "local 'mom and pop' stationery store, shoemaker, tailor, cleaner, or barber" does not work. Ante at 412, 655 A.2d at 427. Anyone who needs a repair person, unlike someone buying a newspaper or leaving a suit at the dry cleaners, is generally vulnerable. The motorist whose car breaks down on the highway is vulnerable to the demands of the tow truck operator and the service station. The individual with a broken washing machine does not enjoy equal bargaining power with the appliance repair person. And the homeowner with a broken lawn mower is open to exploitation.

Unlike the majority, I would characterize as in the public interest articles about businesses that exploit vulnerable consumers. I prefer to join those courts that find in the public interest exposure of unfair or dishonest business practices of repair shops. See Unelko Corp. v. Rooney, 912 F.2d 1049, 1056 (9th Cir.1990), cert. denied, 499 U.S. 961, 111 S.Ct. 1586, 113 L.Ed.2d 650 (1991) (holding that comments about consumer product's effectiveness involve matter of public concern); Diversified Management Inc. v. Denver Post, Inc., 653 P.2d 1103, 1108 (Colo.1982) (holding that activities of real estate developer engaged in sales to public are matter of public concern). In reaching this conclusion, I recognize that most repair people are honest and competent. Some are not. Rooting out exploitive and incompetent repair shops is in the interests of both honest repair people and the public.

Although mindful of the risk of biased reporting, I remain persuaded that the media serve the public interest in exposing consumer exploitation. For a decade, this Court has protected

speech that "affects the health and safety of the citizenry, or involves a highly regulated industry." Ante at 409, 655 A.2d at 426. Also entitled to protection is speech about businesses that exploit consumers, even if those businesses have not violated the Act.

Finally, I would be less than faithful to our precedents if I did not express regret about the majority's excessive reliance on federal cases and their reliance on the concept of "actual malice." If only the Court would look to its own decisions it could solve the present problem without resort to constitutional principles. I continue to believe that

> we lose nothing by striking "malice" from the vocabulary of the common law of defamation. Indeed, the Restatement eschews the term altogether, speaking instead of the "abuse of privilege." It is more direct to recognize the legal consequences of the publication of certain statements without recourse to so ambiguous a word with such a checkered past. For example we need not resort to the term "malice" to state that no one has a license to lie. Although we discard the label, we adhere to the principle that to overcome a qualified or conditional privilege, a plaintiff must establish that the publisher knew the statement to be false or acted in reckless disregard of its truth or falsity. With or without the term, the critical determination is whether, on balance, the public interest in obtaining information outweighs the individual's right to protect his or her reputation.

Appendix B

[Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 151, 516 A.2d 220 (1986) (citations omitted).]

I would affirm the judgment of the Appellate Division.

Justice O'Hern joins this opinion.

APPENDIX C — OPINIONS OF THE APPELLATE DIVISION DATED JANUARY 3, 1995

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-159-92T3

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation, and JOHN L. GLORIA,

Plaintiffs-Appellants,

v.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARY ANNE DE MARCO AND EDWARD MITCHELL, D/B/A EDDIE'S POWER EQUIPMENT,*

Defendants-Respondents.

Argued Sept. 21, 1993. — Decided Jan. 3, 1994.

Before Judges MICHELS, KESTIN and WEFING.

On appeal from the Superior Court, Law Division, Bergen County.

Richard E. Brennan, Morristown, for plaintiffs-appellants (Shanley & Fisher, attorneys; Mr. Brennan and Joseph M. Cerra, on the brief).

---

* During the pendency of this appeal, plaintiffs filed a stipulation dismissing the appeal with prejudice as to defendant Edward Mitchell, d/b/a Eddie's Power Equipment.

Appendix C

Peter G. Banta, Hackensack, for defendants-respondents (Winne, Banta, Rizzi, Hetherington & Basralian, attorneys; Mr. Banta, of counsel; Donald A. Klein and Peter F. Weiss, on the brief).

The opinion of the court was delivered by

KESTIN, J.A.D.

In this defamation action, the trial court granted defendants' motion for summary judgment, holding that plaintiffs had failed "to raise a genuine issue of actual malice." Plaintiffs appeal. We affirm.

Defendant newspaper, the Bergen Record Corporation, published an article authored by defendant Locklin which depicted in an unfavorable and allegedly false light the services rendered by plaintiff corporation (Turf) to its customers and the manner in which its president and owner, plaintiff Gloria, ran the business. The article and accompanying material entitled "A Clip Joint for Lawn Mowers," was the product of investigative reporting by Locklin and a research assistant employed by the newspaper, defendant De Marco. Plaintiffs contend that the impetus for the investigation and resulting publication was personal pique on the part of Locklin when, as a customer of Turf, he was displeased both with the treatment he was accorded by employees of Turf and with their advice that his lawnmower was not worth repairing. Locklin's investigation included some tests intended to establish the manner in which Turf and a number of other lawnmower repair companies dealt with various lawnmower performance problems; undisclosed tape recordings of some conversations with Turf employees during tests; and interviews with the Better Business Bureau, local competitors of

Turf, other lawnmower repair operators who did not compete with Turf, former Turf employees, customers of Turf, and with Gloria himself. Plaintiffs allege, *inter alia*, that Locklin's tests were improperly conducted and falsely reported, that he knowingly relied on biased sources, that he intentionally omitted information favorable to plaintiffs, and that specified statements in the article were false.

Two of the issues that plaintiffs advance on appeal are interconnected. Plaintiffs contend that the trial court erred in applying a heightened proof standard in respect of their claim for compensatory damages. In this regard, they argue that the newspaper article for which defendants are responsible did not concern matters of legitimate public interest and that neither Gloria nor Turf was a public official or a public figure. The related issue advanced by plaintiffs is that their proofs, in respect of their claim for compensatory damages, are more than sufficient to establish defendants' negligence and knowledge of falsity. In addition, plaintiffs seek punitive damages and argue that their proofs will satisfy a heightened standard in this regard.

In *Gertz v. Welch*, 418 *U.S.* 323, 94 *S.Ct.* 2997, 41 *L.Ed.*2d 789 (1974), the United States Supreme Court held that the "actual malice" standard articulated in *New York Times Co. v. Sullivan*, 376 *U.S.* 254, 84 *S.Ct.* 710, 11 *L.Ed.*2d 686 (1964), to govern defamation actions, applies only to public officials and public figures, not to private individuals.

> [S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Appendix C

[*Gertz v. Welch, supra*, 418 *U.S.* at 347, 94 *S.Ct.* at 3010, 41 *L.Ed.*2d at 809.]

The Supreme Court of New Jersey defined and applied our common law standard governing defamation actions by private plaintiffs in *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 *N.J.* 125, 516 *A.*2d 220 (1986), and *Sisler v. Gannett Co.*, 104 *N.J.* 256, 516 *A.*2d 1083 (1986), both decided on the same day. For reasons having to do with the character of each plaintiff's activities and the degree to which that conduct implicated matters of "legitimate public concern" the Supreme Court held the actual malice standard to apply in the instances presented in both cases. Dairy Stores and Sisler also demonstrate the method by which the governing proof standard is to be selected, and they refer to some of the permissible choices.

The statuses of the corporate and individual plaintiffs in this case are similar to those of the corporate and individual plaintiffs in *Dairy Stores* and *Sisler* respectively. They are clearly private persons who have been subjected to general public notice by the very conduct which they allege gives rise to their cause of action. *See also Gertz v. Welch, supra*, 418 *U.S.* at 351-52, 94 *S.Ct.* at 3012-13, 41 *L.Ed.*2d at 811-13.

There are qualitative differences between these plaintiffs and the plaintiffs in *Dairy Stores* and *Sisler* to be sure; but the differences and the manner in which they bear upon the needs of public discourse are not so substantial as to require a variant result. We conclude, instead, that the plaintiffs in this case should be held to the heightened proof standard that "actual malice" connotes.

One of the differences is that the alleged defamation to the

corporate plaintiff in this case concerns a service rather than a product, bottled drinking water, as in *Dairy Stores*. That difference, however, provides no valid basis for distinguishing this case from *Dairy Stores*. We can perceive no principled basis for evaluating the legitimacy of the public interest in commercial activities differently because a service is involved rather than a product. Nor is the importance of the product or service as relating to "an essential of human life," *Dairy Stores, supra*, 104 N.J. at 145, 516 A.2d 220, the only permissible basis for concluding that a matter of legitimate public concern is implicated. The Supreme Court, in initially defining our common law standard, decided Dairy Stores on that narrow basis, viewing "drinking water [as] a paradigm of legitimate public concern" because of its essential nature and because the State had for some time "regulated the sale of bottled drinking water, and anyone engaged in the business of bottling and selling drinking water must be licensed by and comply with regulations of the Department of Health." *Ibid.* While employing that narrow basis of decision, the Supreme Court left "to the future a more complete definition of matters of legitimate public concern." *Ibid.*

We also do not understand the listing in *Dairy Stores* of then "developed criteria [in other jurisdictions] for determining whether the activities and products of corporations constitute matters of public interest" to limit our consideration in this case. The fundamental test that governs was succinctly stated by the Supreme Court in both *Dairy Stores* and *Sisler.*

> We recognize that not everything that is newsworthy is a matter of legitimate public concern. . . . [T]he assessment of public interest includes a determination whether the

> person "voluntarily and knowingly engaged in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny."
>
> [*Dairy Stores, supra,* 104 *N.J.* at 144, 516 *A.*2d 220 (citing *Sisler, supra,* 104 *N.J.* at 274, 516 *A.*2d 1083).]

When the plaintiffs in this case undertook a business serving the general public, they had to understand that the members of that public would be interested in the quality of that service, the prices that were charged, the treatment accorded to customers, promptness in performance, and other factors bearing upon the character, cost and dependability of the service offered. It is clear, as well, that Gloria, as an enterprising merchant, wanted his business to grow as large as possible as quickly as possible. His interest was in serving as many customers as could be attracted to Turf, not in developing a service marketed as exclusive in character and limited in availability to a select clientele. Thus, we can accept as given that plaintiffs did not choose to put their light under a bushel. Rather, it was their manifest intention, common among persons in commerce, that information concerning their business and its reliability would travel, and that customers would be attracted through word of mouth as well as whatever advertising plaintiffs purchased. It was, in short, to plaintiffs' benefit and very much their purpose to engender "public attention." *See Dairy Stores, supra,* 104 *N.J.* at 144, 516 *A.*2d 220.

No person with such an intention could reasonably hope to

derive the benefits that flow from public notice and, at the same time, rely on the law to provide shelter from any detrimental consequences, including the "scrutiny" referred to in *Dairy Stores* and *Sisler.* The "legitimate need" of consumers "to learn about the reputation of the business entities" with which they deal cannot be gainsaid. *Dairy Stores, supra,* 104 *N.J.* at 151, 516 *A.*2d 220.

> From that need emanates the right to publish information concerning the nature and quality of goods intended for human consumption, and the reputations of those who make, distribute, and sell those goods.
>
> [*Ibid.*]

Because it is our view that, for this purpose, there are no differences between goods, on the one hand, and services, on the other, we hold that any person or business which opens itself to the general public thereby subjects itself to the scrutiny that naturally comes with the attention it seeks, and thus creates a subject of legitimate public interest. It follows by the rule of *Dairy Stores*, that the heightened proof standard of actual malice devolves when the owners of the business seek to vindicate their interests in a defamation action.

In this regard, Gloria has no legitimate claim to the private person's protection also sought by the plaintiff in *Sisler.* Although it is clear that Gloria is not a public figure or official and that he is, therefore, protected by a broader zone of privacy than a public figure or official would be, the contents of defendants' article had nothing to do with those of Gloria's interests which are properly encompassed within his zone of privacy. The offending

article in *Sisler,* notwithstanding that it dealt with the plaintiff's private interests and activities, was held not to qualify for a more ordinary, negligence focused, proof standard because the activities addressed implicated a highly regulated business, banking, and the plaintiff as a sophisticated banker and business person was presumed to understand the public's interest in his private banking transactions.

> [W]hen a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity, defamatory speech that focuses upon that public interest will not be actionable unless it has been published with actual malice.
>
> [*Sisler, supra*, 104 *N.J.* at 279, 516 *A.*2d 1083.]

Our decision in this case rests upon no such nuance. Every comment complained of in the offending article dealt with Gloria's activities in the business of plaintiff Turf, which we hold to be of legitimate public interest; or with his activities in politics, which are *per se* matters of legitimate public interest.

We agree substantially with the reasons articulated by Judge Marguerite Simon for her conclusion, given the posture of the case and its probable proofs as presented through the papers filed on the motion for summary judgment, that "a genuine issue of material fact that defendants published with actual malice" did

not exist, *i.e.*, that defendants published false and injurious statements with knowledge of their falsity or with reckless disregard for their truth or falsity. *Dairy Stores, supra,* 104 *N.J.* at 155-57, 516 *A.*2d 220. In order to succeed, plaintiffs must be prepared to show that defendants or any of them "entertained serious doubts about the truth" of the published material. *Id.* at 157-58, 516 *A.*2d 220; *see also St. Amant v. Thompson*, 390 *U.S.* 727, 88 *S.Ct.* 1323, 20 *L.Ed.*2d 262 (1968). Nothing in the record before us creates a genuine issue of material fact when measured by the heightened proof standard in the light of the need for a "state of mind" showing. *Dairy Stores, supra,* 104 *N.J.* at 156-57, 516 *A.*2d 220; *see also Masson v. New Yorker Magazine, Inc.*, 501 *U.S.* __, 111 *S.Ct.* 2419, 115 *L.Ed.*2d 447 (1991). Therefore, defendants' motion for summary judgment was properly granted.

Affirmed.

Appendix C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-159-92T3

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation, and JOHN L. GLORIA,

Plaintiffs-Appellants,

v.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARY ANNE DEMARCO and EDWARD MITCHELL, d/b/a EDDIE'S POWER EQUIPMENT,

Defendants-Respondents.

WEFING, J.S.C. (temporarily assigned) concurring.

Plaintiff Turf Lawn Mower Repair, Inc. (Turf) is a corporation wholly owned by plaintiff John L. Gloria (Gloria). Its business, the repair and sale of lawn mowers, was effectively destroyed following the publication of an article in the August 21, 1988 edition of the *Bergen Record* which bore the headline "A Clip Joint for Lawn Mowers," with the sub-heading "Tests, ex-workers reveal Teaneck shop deceives, overcharges." The article was written by defendant Bruce Locklin (Locklin), the Investigative News Editor of the *Bergen Record* for the past twenty years. Turf and Gloria filed a complaint seeking damages for defamation, intentional interference with prospective business advantage and violations of *N.J.S.A.* 2C:41-1, *et seq.*, the New Jersey Racketeer Influenced and Corrupt Organizations Act (RICO).

Appendix C

The parties engaged in extensive discovery and the plaintiffs have served an expert's report which delineates how, in the view of its author, the defendants' preparation and writing of this article failed to comply with journalistic standards for investigative reporting. Defendants have served their own expert's report which takes the contrary position.

Plaintiffs dismissed, without prejudice, their RICO claims, and the trial judge dismissed the remaining claims. Plaintiffs have appealed to this court from the dismissal of their defamation claims. They do not contest in this appeal the dismissal of their claim for interference with prospective business advantage. With regard to the defamation claims plaintiffs argue that the trial court erred in concluding that plaintiffs' claims should be dismissed. Plaintiffs contend that the business of Turf, i.e., the sale and repair of lawn mowers, is not a matter of legitimate public interest so as to invest defendants with a qualified privilege, and that, as a result, plaintiffs are not required to prove actual malice to prevail in a cause of action for defamation.

Analysis of defamation claims has long been complicated by the various meanings attributed to the term "malice." Justice Pollock has observed that the use of the word malice "adds nothing to the legal analysis of an allegedly defamatory statement, and it can become a pitfall in the underbrush of the common law." *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.*, 104 *N.J.* 125, 151, 516 *A.*2d 220 (1986). He has further noted that the test for the existence of actual malice is "whether the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 149, 516 *A.*2d 220 (quoting *St. Amant v. Thompson*, 390 *U.S.* 727, 731, 88 *S.Ct.* 1323, 1325, 20 *L.Ed.*2d 262, 267 (1968)).

Appendix C

The Supreme Court in *Dairy Stores* delineated those subjects which, as a matter of law, had been considered of legitimate public interest for purposes of analyzing claims of defamation involving statements made about corporations and their products. The significance of this threshold determination is that if the subject is deemed to be one of legitimate public interest, the speaker is invested with a qualified privilege. The Supreme Court included within this category "such essentials of life as food and water" and those products having a widespread effect. *Dairy Stores, supra,* 104 *N.J.* at 144, 516 *A.*2d 220. Some examples of the latter cited by the Supreme Court include possible causes of cancer, flammability of baby cribs, and possible cures for cancer and other widespread diseases such as arthritis. *Ibid.* The only other criterion contemplated by *Dairy Stores* to assist the determination of whether the activities and products of corporations may constitute a matter of legitimate public interest in the context of a claim for defamation, is the existence of substantial government regulation of business activities and products. *Id.* at 145, 516 *A.*2d 220. Indeed, the majority opinion in *Dairy Stores* specifically disagreed with the concurring opinion which would have extended the actual malice standard to any product. *Id.* at 146, 516 *A.*2d 220.

The trial judge here noted in her oral opinion that the plaintiffs had conceded before her that they were subject to this actual malice standard. Plaintiffs argue that the trial judge erred in making that statement, but I do not agree. The transcript of the argument on the defendants' motions for summary judgment is in excess of 160 pages. Nowhere within that argument do the plaintiffs dispute the applicability of the actual malice standard. Plaintiffs' briefs, filed in advance of the argument, may have contended that plaintiffs were not required to establish actual malice, but plaintiffs never urged that position to the judge below.

Appendix C

The trial judge's entire approach to the argument presented below rested on the premise that these plaintiffs were equired to establish malice to prevail. Plaintiffs never disputed that premise during the argument but consistently responded in terms of their ability to satisfy that standard. It is clear that at the oral argument of the motions below, they had retreated from the position originally asserted in their briefs.

Since the determination of this matter at the trial level, plaintiffs have retained new counsel who argue vigorously that plaintiffs should not be subject to this standard. I do not consider it appropriate for plaintiffs to have conceded the applicability of the standard to the trial court, but now argue on appeal that the trial court erred in using that standard. I thus find it unnecessary to decide whether plaintiffs' business involving the sale and repair of lawn mowers is a matter of legitimate public interest.

I agree that on the record presented there is no reasonable prospect that the plaintiffs, having concluded discovery in this matter, will be able to establish that these defendants entertained serious doubts as to the truth of the publications, and I concur in the affirmance of the dismissal of plaintiffs' claims.

APPENDIX D — TRANSCRIPT OF THE TRIAL COURT DECISION DATED JULY 28, 1992

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO. L-30435-89

TURF LAWNMOWER REPAIR, INC., A New Jersey Corporation and JOHN L. GLORIA,

Plaintiffs,

v.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DE MARCO, DAVID HALL, BYRON CAMPBELL, RAYMOND MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, EDWARD MITCHELL, d/b/a EDDIE'S POWER EQUIPMENT, JOHN DOE and RICHARD ROE, INC.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Bergen County Courthouse
10 Main Street
Hackensack, New Jersey
Tuesday, July 28, 1992
9:20 a.m.

BEFORE:

HONORABLE MARGUERITE T. SIMON, J.S.C.

Reported by:
LAURA T. BATHISH, C.S.R.

Appendix D

APPEARANCES:

JAFFE & SCHLESINGER, P.A.
8 Mountain Avenue
Springfield, New Jersey, 07081
BY: ROBERT H. JAFFE, ESQ.
GREGORY A. DEVERO, ESQ.
Attorneys for the Plaintiffs

WINNE, BANTA, RIZZI,
HETHERINGTON & BASRALIAN, P.C.
25 Main Street
P.O. Box 647
Hackensack, New Jersey, 07602
BY: DONALD A. KLEIN, ESQ.
PETER F. WEISS, ESQ.
Attorneys for the The Record
Defendants

Appendix D

THE COURT: The Bergen Record defendants seeks summary judgment on the defamation counts, the counts remaining in this action which commenced on January 13, 1989. The article giving rise to this litigation was written by Bruce Locklin and entitled "A Clip Joint For Lawnmowers". Plaintiff, Turf Lawnmower Repair, is characterized as a highly successful clip joint. Plaintiff John Gloria noted as New Jersey's young entrepreneur of the year in 1986 is described as a fiercely ambitious 29 year old millionaire who owns the repair shop where, as stated in the article, former employees estimate that 60 to 80 percent of the repairs were rip offs.

It is to be noted that the individual statements alleged to be defamatory were not separately addressed in the moving and opposing briefs. Accordingly, they are not separately addressed here. This court incorporates the complete article as published as part of this decision. Neither is this court requested, for the purpose of this summary judgment motions, to address the threshold issues of either the truth or the defamatory nature of these statements. For the purposes of this motions, the statements are presumed to both untruthful and defamatory in nature. Submissions by each side have been voluminous and include briefs, affidavits, deposition transcripts and even two tapes of recorded conversations.

Any summary of the modern day law of defamation must begin with *The New York Times Co. vs. Sullivan* 376 U.S. 254, in 1964, where the United States Supreme Court addressed the constitutional mandates of the First Amendment and interposed an actual malice standard in the case of a public official.

Actual malice, in a defamation context, is defined as acting with knowledge of falsity of the statement or acting in reckless

disregard of its truth or falsity. Subsequent Supreme Court cases extended that standard to public figures.

The federal constitutional protection was broadened in *Rosenblum vs. Metromedia*, 403 U.S. 29 in 1971, but soon was modified in *Gertz vs. Roberts Welch, Inc.* 418 U.S. 323 in 1974, where the United States Supreme Court reaffirmed their public figure/private figure dichotomy and held that some voluntary action was necessary to thrust a private individual into the status of public figure. As to private individuals, the Gertz court stated at Page 347:

"We hold that, so long they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual".

This accommodation to State interest and State common law does not apply to punitive damages where the Gertz court mandates an actual malice standard.

Our New Jersey Supreme Court enunciated our applicable common law criteria in the 1986 companion cases *Dairy Stores, Inc. vs. Sentinal Publishing Co.*, 104 N.J. 125, and *Sisler vs. Gannett Co., Inc.*, 104 N.J. 256. *Dairy Stores* involved articles published in Sentinal newspapers on the quality of bottled water.

The reporter tried to learn the source of Krauzer's water called "Covered Bridge Crystal Clear Spring Water". Krauzers declined to identify the source. If chlorine were present it could not be spring water. The reporter took the water to three laboratories. The first which identified itself as a customer of Krauzer's tested the water and said it did not contain chlorine.

Appendix D

A second independent laboratory, Paterson, told the reporter that exposure to the air made more difficult an accurate analysis. Nevertheless, in repeated tests Paterson found chlorine present.

A third laboratory, Princeton, submitted results in incomprehensible to the reporter. The resulting article headlined "Spring Water Independent Lab Analysis Casts Doubt On Content". I'm quoting from the article in that case:

"A sample bottle of Covered Bridge Crystal Clear Spring Water sold at Krauzers convenient food stores, does not contain pure spring water, according to a laboratory analysis obtained by the Sentinal newspapers".

Defendants, in *Dairy Stores*, moved for summary judgment which was granted by the trial court and affirmed by the Appellate Division, after applying the actual malice standard based upon federal and constitutional law. The Supreme Court, in affirming the grant of summary judgment, also applied the actual malice standard but based their determination upon common law and the qualified privilege attached to fair comment. Actual malice is required to establish a cause of action for defamation in matters of legitimate public concern. Justice Pollack in *Dairy Stores* notes at Page 149:

"As the actual malice standard has evolved, the relevant test is not whether a reasonably prudent man would have published or would have investigated before publishing, but whether the defendant in fact entertained serious doubts as to the truth of his publication, citing *St. Amant vs. Thomas*, 390 U.S. 727, 1968. That test, which is substantially subjective, is akin to the common law requirement that to qualify as fair comment, a statement must honestly express the writer's true opinion".

Appendix D

The court in *Dairy Stores* disavowed usage of the term malice, but kept the identical criteria. In addition, it repudiated the federal standard for summary judgment under Federal Rule 56, which would require evidence permitting a rational finder to find actual malice by clear and convincing evidence. Although noting that there may be little practical difference between the two standards, *Dairy Stores* reaffirmed the Judson standard for summary judgment in a defamation context, as the court should not intrude into the province of the jury and become a fact finder.

The companion case *Sisler* differs from *Dairy Stores* in that the plaintiff in *Sisler* is an individual with a personal reputational interest, engaging in an essentially private transaction rather than a corporate commercial enterprise. Although this individual has not purposefully thrust himself into the spotlight, the Federal standard, he has voluntarily risked exposure on a subject matter of legitimate public concern, a large loan between a bank and its founder and former president. The actual malice test must also be applied to such an individual.

Upon oral argument in the present case, this actual malice standard was apparently, and also correctly conceded by all counsel to be applicable to plaintiffs Turf Lawnmower and John Gloria.

Accordingly, this court must heed the comments of *Dairy Stores* at Page 157:

"The dispositive question then is whether there is a genuine issue that any of the defendants displayed reckless disregard in publishing the two factual statements. Because this issue implicates the defendants' state of mind, we approach it with due respect for the difficulty of granting summary judgment

dismissing the complaint. Nevertheless, we recognize also that summary judgment practice is particularly well suited for the determination of libel actions, the fear of which can inhibit comment on matters of public concern".

Reporter Bruce Locklin had engaged in several investigative projects for The Record, including a series on deceptive practices at Wild Bill's auto dealerships and an expose of Bel Air Nursing Homes, as well as a Mr. Bad Rench series on automobile repairs.

Mr. Locklin's affidavit states that the possibility of looking into lawnmower repairs was suggested by The Record's then Managing Editor Bernard Buranelli, who had what he deemed a "suspicious" experience at a lawnmower repair shop.

After Locklin left his own inoperative Lawn Boy lawnmower at Turf of and received what he considered curt replies to his telephone calls inquiring if the work was completed, Locklin learned that Buranelli's suspicious experience was also with Turf.

When he picked up that lawnmower on June 8, 1988, Locklin wore a hidden tape recorder. The recorded conversation, provided to the court, between Locklin and Ray from Turf says that the lawnmower cannot be fixed. We could have got you for 50, 60. We couldn't even service the damn thing. Locklin paid a 20 dollar diagnostic fee to Turf, and later brought the same lawnmower to a shop in Nanuet, New York, where it was repaired, but Locklin was charged $114 for parts.

Bruce Locklin then spoke with competitors of John Gloria at Tenafly Mowers, where the owner's son told Locklin that John Gloria had a bad reputation in the business. The operators of

another competitor, Power Equipment in Bergenfield, did not want to get involved, but indicated to Locklin that Gloria had a bad reputation.

Locklin then devised what he designated a test, loosening spark plug cables so a mower would not start, and bringing that mower for service. He claims he used similar methods in prior investigative reports.

On June 27, 1988, Locklin's assistant Mary Anne DeMarco, took the same old but newly repaired Lawn Boy mower back to Turf where, after several weeks had passed, she was advised by Turf personnel that it needed a tune-up.

Then Mr. Locklin used the same loose spark plug cable test with another lawnmower, a Bobcat Mower, which he took to twelve repair shops and designated the six shops which instantly spotted the trouble as "winners" in The Record article.

John Gloria maintains that to loosen a cable and call it a test is "absurd" and an unsavory dirty trick, as lawnmower repair shop personnel are likely to believe that all lawnmower owners understand that the spark plug cable must be connected in order to start their lawnmower.

Gloria notes that it is standard operating procedure to disconnect the spark plug cable before working on a machine. Using an assumed name, Locklin took the Bobcat to Turf with the spark plug cable loosened, and was told it probably needed a full tune-up. Four weeks later Locklin picked up the Bobcat mower after paying for a full tune-up. Locklin's notes reflect that he was told the mechanic put in new points in this solid state engine. Plaintiff Gloria disputes this and maintains that the mechanic's

reference to points was a general one for the standard tune-up procedure and not what was done to the Bobcat.

Bruce Locklin spoke with two individuals who had brought Small Claims cases against Turf, and in the article quotes one Andrea — and I can't pronounce the name — Daglezt, as saying the man behind the counter treated her as if she were an idiot. "That guy amount had my fist down his throat", she said. "He was so nasty". Locklin neglects to add that Turf won both cases in Small Claims court.

Mr. Locklin contacted the Better Business Bureau and found three complaints against Turf. He received no response to an ad in the Want Ad Press looking for anyone who experienced a lawnmower repair rip off.

Locklin interviewed four former employees of Turf. One Robert Vroeginday told Locklin, among other things, that Turf would use old parts and charge for new, that 65 percent to 75 percent of the customers were getting ripped off. Bob Vroeginday owes Gloria bail money, which Gloria lent to him at the time of an assault charge against Vroeginday.

A second former employee Mark Winners said Gloria became cheap, and customers were lied to. Winners said he quit because he was tired of customers getting ripped off. Gloria states Winners was fired when he was caught offering to do work on the side for Turf customers.

Douglas Livingston, the third employee, also had negative comments about Gloria, that Gloria straight out said to do as little as possible to make this machine run. Gloria said Livingston, a $3.85 an hour mechanic, left when Gloria would not give him a raise.

Appendix D

Guy Griese, a former employee who initially asked Bruce Locklin that he not be named, recanted his prior testimony in an affidavit noting that at the time of his interview with Locklin he had been upset about a dispute with Turf's Worker's Compensation carrier, and merely acquiesced to Locklin's comments.

Eddie Mitchell, another competitor of Gloria in Paramus, was quoted in the article stating, "there was so much money to be made the straight way". John Lindsay, Mitchell's mechanic, also called Gloria a real crook.

Bruce Locklin and Mary Anne DeMarco met with John Gloria at the River Edge Diner on August 10, 1988. Gloria told them of his expansive plans in the lawnmower industry where he hoped to do for lawnmowers what Century 21 did for real estate, and according to Locklin, John Gloria did not deny the essential allegations of the article. Neither in Gloria's affidavit does he state that he denied the essential allegations of the article. Gloria noted that he had spent too much time away from his business, Turf Lawnmower Repair.

John Gloria in his affidavit calls this an "ambush" interview in which Mr. Bruce Locklin began by noting that he was doing a follow-up article to the prior article on Gloria's young entrepreneur of the year award, and Locklin then abruptly changed his tone and became accusatory toward Gloria.

Gloria notes the bias of disgruntled former employees and competitors. Gloria also comments that a chart at Turf conspicuously listed prices and pointed out the difference between a spring maintenance and a full tune-up.

Appendix D

Reports of plaintiff's experts indicate that Locklin's tests were unfair and demonstrate a lack of knowledge of the procedures in the lawnmower repair industry. Indeed, according to plaintiff, Mr. Locklin and Mr. Buranelli should have been well satisfied by the services provided to them by Turf.

Hampden h. Smith, the head of the Department of Journalism at Washington and Lee, notes the lack of fairness by Locklin, the tests were not independent, and the article in question veered far from legitimate professional practice.

Does this background raise a genuine issue of material fact, as to Bruce Locklin's state of mind?

Plaintiffs cite the United States Supreme Court in *Masson vs. New Yorker Magazine, Inc.* 115, 447, 1991, where the Court deemed summary judgment inappropriate in a matter where direct quotes were altered and their meaning changed. *Masson* indeed states fabricated quotes indicate a degree of recklessness requiring a jury as fact finders. Nevertheless, *Masson* reaffirms the editorial process and does not require total accuracy.

For the purposes of summary judgment, this court accepts plaintiff's version of any contradicted facts. This court accepts that in retrospect the tests were unfair, the informants biased, and the questions loaded. Nevertheless, the comments of each individual to Bruce Locklin were highly detailed and cumulatively very similar. There was no allegation of deliberate knowledge of falsehood but of reckless disregard.

This court must look at this matter at the time in question and determine if there are any material facts which could raise a jury question as to reckless disregard for the truth, which approaches

the level of publishing a knowing or calculated falsehood, or as stated by Justice Pashman in Maressa vs. New Jersey Monthly, 89 N.J. 176 at Page 199:

"Reckless disregard for the truth may be found when a published report is based solely on an unverified and anonymous telephone call or when the publisher's allegations are so inherently improbable that only a reckless man could have put them into circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of this reports".

"A finding of actual malice may not be based solely on the character of the published statement nor may it be based solely on the publisher's failure to seek independent verification of the information. The two in combination, however, may support a conclusion of recklessness".

Here there were numerous informants, all of whom gave detailed information, and Locklin made what he considered efforts to verify that information. He even confronted John Gloria who did not deny the allegations.

Here, although the methods employed may have been negligent or even grossly negligent, the notes and interviews of Locklin are sufficiently detailed and cumulatively are specific and corroborative.

This court is mindful of the article's detrimental impact on plaintiff. Viewed from the perspective of the justice system, plaintiff did not get a fair trial before the verdict of Locklin was published in The Record. Yet, this court must be mindful of the importance of a free press to our society and the reasons

underlying the tremendously difficult standard imposed by our Supreme Court in defamation cases.

Plaintiff fails to raise a genuine issue of actual malice and summary judgment is granted.

Submit an order.

MR. KLEIN; We have already.

THE COURT: Okay.

MR. JAFFE: Thank you, Your Honor.

(Decision concluded.)

Appendix D

CERTIFICATE

I, LAURA BATNISH, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth, to the best of my ability.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney or counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and at I am not financially interested in the action.

s/ Laura Bathish
Notary Public of the State of New Jersey
My commission expires December 1993
Certificate No. XI01270

APPENDIX E — COPY OF DEFAMATORY NEWSPAPER ARTICLES

NEW JERSEY RECORD

SUNDAY, AUGUST 21, 1988

A SPECIAL REPORT

A clip joint for lawn mowers

Tests, ex-workers reveal Teaneck shop deceives, overcharges

By Bruce Locklin
Record Staff Writer

There's a little red barn in Teaneck that thrives on dealing with cranky customers — homeowners with broken mowers and shaggy lawns. The barn houses Turf Lawn Mower Repair, a highly successful clip joint.

Turf's owner, John Gloria, was honored by the Small Business Administration in 1986 as New Jersey's young entrepreneur of the year. Fiercely ambitious, he set out to become a millionaire by age 30 and later run for Congress.

Today, at 29, Gloria has made his first million, with $500,000 to spare. But his success is flawed. Though his shop did about 12,000 repair jobs in the past three years, former employees estimate that 60 to 80 percent were rip-offs.

Most customers who paid for tune-ups got little more than an oil change and a new spark plug — for which they typically were

overcharged $20 to $30. Some paid for new parts and got used parts from junked mowers. Many were charged for repair work that was never done.

Independent tests conducted by The Record produced similar results. Reporters brought in mowers in need of simple repairs. Each time, Turf recommended or performed unnecessary work.

There's a pervasive rudeness at Turf, where employees often add insult to injury. One customer, Andrea Daglezt of Bogota, said the man behind the counter talked to her as if she were an idiot. "That guy almost had my fist down his throat," she said. "He was so nasty."

Gloria himself comes across as good-natured. He's 5-foot-6, with dark, curly hair and a frequent smile. But former employees say he used to punish customers who irritated him, often holding their mowers an extra week out of spite.

Gloria's methods amaze his competitors, including Ed Mitchell, 44, a former friend who owns Eddie's Power Equipment in Paramus.

"I don't understand why he has to do this," Mitchell says. "There's so much money to be made the straight way."

Gloria insists his work is legitimate and, as evidence, cites Turf's success: "I would not have as much of a following as I have if I ripped people off."

But tests conducted by The Record produced evidence of systematic rip-offs at Turf. Reporters took mowers there three

times. Turf employees misdiagnosed problems, recommended work that wasn't needed, and charged for work that wasn't done.

Told about those results, Gloria blamed unskilled workers for making mistakes. He said his quality controls slipped this year because he was heavily involved in other investments and politics.

"I had my fingers in so many pots that they were getting burned," Gloria said.

He's focusing on mowers again, he said, because he plans to "revolutionize" the industry this fall, becoming a public company with a stock offering and setting up franchised dealerships.

"I'm going to do for lawn mowers in this country what Century 21 did for real estate agencies."

Gloria spent last week at the Republican National Convention in New Orleans as a volunteer for Jack Kemp. He collected more than $40,000 for Kemp's presidential campaign last year when the candidate came to a fund-raiser at Gloria's $500,000 home in Franklin Lakes.

Gloria expects Kemp will be president someday and still hopes to run for office himself. His success story does have some inspirational elements.

His father is a postman, and his mother is a waitress. He grew up in New Milford, a few blocks from the mower shop. He got a job there when he was 14. By the time he graduated from Ramapo College at age 20, he was managing the place. Gloria had planned to go to law school, but Bob Engel, the mower shop owner, offered to sell the business. Gloria went for it.

Appendix E

"When Bob had it, it was pretty good," said Mark Winners, 29, of Westwood. "Bob wanted everything done right."

Winners is a former Turf mechanic who stayed on for about a year after Gloria became boss.

"When he worked for Bob, he was a nice guy. As soon as he took over, everything changed," Winners said. "I ended up quitting because . . . I was tired of customers getting ripped off."

Winners said Gloria made bogus tuneups standard procedure. No longer did mechanics routinely install new points and condensers or rebuild carburetors by replacing worn parts.

Instead, the mowers got nothing more than fresh oil, a spark plug, and a quick cleanup. Labor time dropped from 30 or 40 minutes per mower to about 5 minutes.

Three other former mechanics, who each worked at Turf for about two years during the 1980-86 period, said they had the same instructions: Do the fake tuneups — but at full tuneup prices.

Mowers often broke down later in the season, the mechanics said, generating more repair work and opportunities to sell new mowers.

Bob Vroeninday, 27, now an auto mechanic in Ridgefield Park, said that when he was working for Turf in 1982 and 1983, Gloria used parts from junked mowers for repair work — without telling customers.

Appendix E

"On a cracked flywheel, he'd use an old one and charge you for a new one because that stuff you can't see," Vroeninday said.

Winners and Vroeninday said Gloria often lied to customers who brought in mowers that had jammed after hitting something solid. He would say the mower's crankshaft needed to be straightened when, in fact, the machine needed only a small part called a keyway. Its price? About $1.

"A job that should have cost $20 would cost about $90," Vroeninday said.

If a customer spotted a rip-off and complained, Gloria blamed his workers.

Doug Livingston, a Turf mechanic from 1984 to 1986, recalled how Gloria tried to make him the scapegoat to appease an angry customer. "He immediately turned around and pointed at me and said, 'This is the guy who worked on it. It's not my fault he didn't do his job.' "

Livingston, who now works at a Fair Lawn shop, said Gloria sometimes got vindictive if a customer became impatient. "He would get mad at him and just kick the machine in the back and say, 'Don't touch that for a week.' "

One customer got sick of being told "we're working on it" for more than a month. Ron Broking, who owns Ronnie's Restaurant in Palisades Park, went around back and found his mower untouched.

"It never, never got looked at," Broking said. "That's what burned me up because it was a lie." Broking packed his mower in his car and took it to another shop.

Appendix E

Mel Clansky of New Milford had a tougher time of it. He paid Turf $54 to fix his electric mower. But when he took it home, it still didn't work. Clanksy took it back to Turf and, while waiting, bought a new machine for $150. Turf called and wanted $200 to repair the old machine.

Clansky just wanted the mower returned, but Turf couldn't find it. He gave up in disgust.

"I wasn't going to bother taking the time off to go to small claims court," Clansky said. "It was unbelievable."

But the business prospered, and Turf's mower sales kept climbing. Gloria won a manufacturer's incentive trip to London in 1985. On the plane, he sat next to Gelmora Persson, who operates a repair shop in Little Silver. She was so impressed with his energy and ambition, she nominated him for the SBA's young entrepreneur award.

Gloria plunged into politics last year because he found business was getting a little boring, he said in a recent interview. Gloria said Kemp's economic thinking appealed to him, and he began looking for a way to play a role in his campaign.

"A woman that's always been involved in politics said, 'You'll be nothing but a peon in presidential politics.' I said, 'You know something — that's not my style. If I'm going to go somewhere, I'm going to the top.' "

He wrote letters and eventually got Kemp's attention. The Buffalo-area Republican stopped at Gloria's home last August to speak to a crowd of 300 and praise America's small businesses. Later Gloria spent weeks in Iowa, campaigning for Kemp in the February caucuses.

Appendix E

"I did take too much time away from Turf," Gloria said, but he vowed to rededicate himself to the lawn mower business with his new franchising concept.

The Record's tests at Turf started in June with a Lawnboy machine that needed carburetor repair. Turf kept the machine three weeks, charged a $20 diagnostic fee, and said it couldn't be fixed.

A Turf salesman offered to take the $20 off the price of a new mower, saying that even the manufacturer couldn't fix the Lawnboy. He pointed to Turf's standard tuneup price and said, "We could have got you for $50 or $60."

A reporter took the mower to a Lawnboy dealer in Nanuet, N.Y., where it was repaired and tuned up. Later, a second reporter took the same machine back to Turf. This time the spark plug clamp had been disconnected, and the reporter said she couldn't get the machine started.

Turf kept the machine another three weeks, charged a $20 diagnostic fee, and recommended an unnecessary $60 tuneup.

In the third test, a reporter took a Bobcat mower in good working condition to Turf. Again, the spark plug clamp was pulled loose so the machine wouldn't start.

Turf kept the machine four weeks and charged $63 for a tuneup. A Turf mechanic said he rebuilt the carburetor and installed new points. But the mower has a solid-state ignition: It has no points.

Appendix E

Told about the tests, Gloria said his counter workers are not mechanics so they sometimes make mistakes.

Gloria said the mechanic who worked on the Bobcat was an 18-year-old apprentice who didn't know what he was talking about.

"He's learning," Gloria said. "He should not even be talking to customers."

A few days after the interview, Gloria issued a press release criticizing The Record for "biased reporting." He said no Turf employee was authorized to engage in deceptive practices.

Other area repair shop owners said they frequently get mowers that malfunction after Turf tuneups. Mitchell in Paramus estimates that he gets 20 each summer.

Why doesn't word of mouth catch up with Turf? Possibly because most customers don't have the technical knowledge to be sure they have been ripped off.

Gloria said former employees and competing dealers are simply jealous of his success.

"I'm driving a Mercedes, and I'm doing well, and I'm getting bigger and bigger and bigger. What are they going to say? Beautiful comments like, I love him?

Asked if ambition may have blinded him, Gloria said he never would have risked his future that way.

"If you burn your bridges, i.e., your customer base, and you

need to do something else, whether it be politics or whatever, and you've got 400 people out there who call you the biggest rip-off in the world, that's the last thing I want. How could you ever do anything in the future in Bergen County if you have negative feelings?"

Investigative researcher Mary Anne De Marco contributed to this report.

Appendix E

Looking for honesty with a faulty machine

Hunting for honest repair shops, The Record used a Bobcat lawn mower as an updated version of Diogenes' lamp. The cynical philosopher couldn't find an honest man in daylight with his lantern. We scored better, batting .500.

The mower was in good working condition. But it wouldn't start because the rubber-coated cap that feeds electricity to the spark plug was pulled loose.

The logic of the test was simple: any place that detected the problem and started the machine right away clearly wasn't out to rip off an easy victim — a reporter pretending the mower was a recent gift from a relative.

We called the test "Bozo-with-a-mower" and visited a dozen repair shops chosen at random. The results:

■ Six places told us to "leave the mower" — these were judged no-verdict tests.

■ Six places started the mower, all without charging a penny. Making the honor roll for honest behavior were:

■ Clifton Power Equipment, 1187 Van Houten Ave., Clifton.

■ Eddie's Power Equipment, 495 Paramus Road, Paramus.

■ Sharp Shop, 251 Godwin Ave., Midland Park.

Appendix E

■ Strauss Brothers Service, 399 DeWolf Place, Hackensack.

■ Weinmann's Garden Center, 1560 Hamburg Turnpike, Wayne.

■ Westwood-Closter Power Equipment, 400 Demarest Ave., Closter.

A reporter took the same machine to Turf Lawn Mower Repair in Teaneck and told the same story. Turf said the mower probably needed a tuneup. The reporter left the mower. Four weeks later, the mower was ready, its spark plug cap in place. The bill was $63.

APPENDIX F — EXCERPTS OF DEPOSITION OF BERNARD A. BURANELLI DATED MARCH 12, 1992

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : Bergen County
DOCKET NO. L-30435-89

TURF LAWNMOWER REPAIR, INC., a New Jersey Corporation, And JOHN L. GLORIA,

Plaintiffs,

-vs-

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARYANNE DE MARCO, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE and RICHARD ROE, INC.,

Defendants.

DEPOSITION OF BERNARD A. BURANELLI

March 12, 1992
Hackensack, New Jersey
Commencing at 10:30 a.m.

* * *

[89] Q. Showing you the article, is there not a whole section of the article dealing with this test?

A. That's true, yes.

Q. And wasn't that part of the discussions with Mr. Locklin about the test?

Appendix F

A. It must have been. I mean, I don't recall specifics, but that would have been the thing to do. But Locklin would have handled that on his own, because he was given a great deal of leeway in that regard.

Q. Such a deal great deal of leeway that you never brought in anyone from the lawnmower industry to consult with him, did you?

A. Well, he spoke to various people who were, who should have known something about lawnmowers.

Q. Did you have a consultant paid by Bergen Record in connection with this article?

A. No.

[90] Q. When you did the "Catching Mr. Bad Wrench," you had a consultant, didn't you?

A. In the automotive report?

A. Yes, that's right.

Q. When you did the article concerning TV's, you had a consultant regarding TV's, didn't you?

A. Yes.

Q. And when you did the article regarding automobiles, you had a consultant regarding automobile sales practices, didn't you?

Appendix F

A. I think so.

Q. But you didn't here?

A. No.

* * *

APPENDIX G — EXCERPTS OF DEPOSITION OF BRUCE LOCKLIN DATED JULY 12, 1990

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—BERGEN COUNTY
L-30435-89

TURF LAWNMOWER REPAIR, INC., a New Jersey Corporation & JOHN L. GLORIA,

Plaintiffs

vs.

BERGEN RECORD CORP., DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARYENNE DE MARCO, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE & RICHARD ROE, INC.,

Defendants.

DEPOSITION OF BRUCE LOCKLIN taken by and before Joan R. Peach, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, on Thursday, July 12, 1990 at the offices of Winne, Banta, Rizzi, Hetherington & Basralian, Esqs., 25 Main Street, Hackensack, New Jersey, commencing at 10 a.m.

APPEARANCES:

JAFFE & SCHLESINGER, ESQS.
BY: ROBERT H. JAFFE, ESQ.
Attorneys for Plaintiff

REM & REM, ESQS.
BY: JEANNE MC GAVIN, ESQ.
Attorneys for Defendants Winners,
Vroeginday, Livingston

Appendix G

WINNE, BANTA, RIZZI, HETHERINGTON
& BASRALIAN, ESQS.
BY: PETER G. BANTA, ESQ.
Attorneys for Defendant Bergen Record Corp.

* * *

[27] A. I have no recollection of being told about a guarantee until the interview with John Gloria.

Q. What did he tell you then?

A. Or actually I'm not even sure it was at the interview. I think it may have come in Mr. Gloria's press release, but I'm not sure exactly. But I'm pretty sure I didn't have any recollection of any discussion of a guarantee during my testing procedures at Turf Lawnmower.

Q. But you did find out there was a guarantee?

A. Eventually, yes.

Q. And that there's such a guarantee?

A. The assertion was made.

Q. Did you ever find that to be false? Now you're a good investigative reporter, Mr. Locklin, Did you ever find it to be false?

A. I have no clear recollection of anybody contradicting the assertion that there was a guarantee, or that a guarantee failed to be honored.

* * *

Appendix G

[64] Q. In your answer you indicated you made a determination. Did you check this test, as you called it, with any person who was an expert in the lawn repair business concerning what is the standard procedure prior to implementing the test?

[65] A. No.

Q. Do you have expertise in the lawnmower repair business?

A. No.

* * *

[124] Q. Based on your note, the person who you spoke to, who you identified as Andy at the Specialty Mower Repair Inc. said to leave the lawn mower and they will check it out. Is that correct?

A. Correct.

Q. And if they can service it, they would charge you $59. Is that correct?

A. Correct.

Q. If not, they would charge you a $15 diagnostic fee?

A. Correct.

Q. In fact, you were charged $114.18?

A. Correct.

Q. Did you feel ripped off?

[125] A. I questioned them about that.

Q. Did they tell you they were going to charge you that much?

A. No, they did not.

Q. Did you complain about them in the article?

A. No, I did not.

Q. Did you say anything about the fact that you went up to Specialty Mower Repair Inc., and they had promised that they will repair it for $59, but they instead charged you $114? Did you mention anything like that in the article?

A. No, I did not.

Q. Did you begin an investigation of Specialty Mower Repair Inc. after that?

A. No, I did not.

Q. Were your suspicions aroused by that incident?

A. Somewhat.

Q. In what way?

A. If I could pause just a minute to look at my notes.

Q. Certainly.

A. Yes, they were.

[126] Q. And what did you do about your suspicions?

Appendix G

A. When I picked up the mower, I asked Mr. Forgacs, the owner, how come I had not received a phone call on the price beforehand, some kind of a call asking me if I wanted to have it done.

He said that his operation — that his notice is — his posted notice said the price was a certain fee, plus parts, and that under state regulations he was entitled to go within 20 percent of that figure without making a phone call, and that he did not bother to call me, because it was within 20 percent of the estimate, and then the parts were an addition.

Q. Did you check out to see if there was such a New York law?

A. I did not.

* * *

[164] Q. One of the things you have in your interview of Mr. Winners, which is Locklin 10, is that John fired him when he caught him offering to do work on the job for Turf customers. Is that correct?

A. That's correct.

* * *

APPENDIX H — EXCERPTS OF DEPOSITION OF BRUCE LOCKLIN DATED AUGUST 7, 1990

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—BERGEN COUNTY
L-30435-89

TURF LAWNMOWER REPAIR, INC., a New Jersey Corporation & JOHN L. GLORIA,

Plaintiffs

vs.

BERGEN RECORD CORP., DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARYENNE DE MARCO, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE & RICHARD ROE, INC.,

Defendants.

DEPOSITION OF BRUCE LOCKLIN taken by and before Joan R. Peach, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, on Tuesday, August 7, 1990 at the offices of Jaffe & Schlesinger, Esqs., 8 Mountain Avenue, Springfield, New Jersey, commencing at 12 noon.

APPEARANCES:

JAFFE & SCHLESINGER, ESQS.
BY: ROBERT H. JAFFE, ESQ.
Attorneys for Plaintiff

REM & REM, ESQS.
BY: JEANNE MC GAVIN, ESQ.
Attorneys for Defendants Winners, Vroeginday, Livingston

Appendix H

WINNE, BANTA, RIZZI, HETHERINGTON
& BASRALIAN, ESQS.
BY: PETER G. BANTA, ESQ.
Attorneys for Defendant Bergen Record Corp.

* * *

[460] Q. As indicated in your notes on "Lawn Test", he wrote down tune-up and you had indicated you wanted the tune-up. Is that correct?

A. No. I think there's — let me just look at my notes here for a second. Yes. He indicated that the machine probably needed a tune-up and that I would have to leave it with him and authorize a tune-up. And if it turned out that the machine needed more than a tune-up, that they wouldn't do a tune-up. Instead, that they would then make an estimate of what is needed and charge me the $20.00 service charge.

* * *

APPENDIX I — EXCERPTS OF AFFIDAVIT OF BRUCE LOCKLIN WITH EXHIBITS DATED MARCH 30, 1992

WINNE, BANTA, RIZZI,
HETHERINGTON & BASRALIAN, P.C.
Court Plaza North
25 Main Street
P.O. Box 647
Hackensack, New Jersey 07602
(201) 487-3800
Attorneys for Defendants
Bergen Record Corporation, David Hall,
Byron Campbell, Bruce Locklin, and
Mary Anne De Marco

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : BERGEN COUNTY

Docket No. L-30435-89

CIVIL ACTION

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation, and JOHN L. GLORIA,

Plaintiffs,

v.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARY ANNE DE MARCO, EDWARD MITCHELL d/b/a EDDIE'S POWER EQUIPMENT, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE, and RICHARD ROE, INC.,

Defendants.

Appendix I

AFFIDAVIT OF BRUCE LOCKLIN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY)
) SS:
COUNTY OF BERGEN)

BRUCE LOCKLIN, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I have been a staff writer and the Investigative News Editor for The Record for the past twenty years and am fully familiar with the facts relevant to this matter.

* * *

s/ Bruce Locklin
Bruce Locklin

Sworn to and subscribed
before me this 30th day
of March, 1992.
s/ Mary T. Guatta
MARY T. GUATTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Dec. 9, 1995

Appendix I

EXHIBIT E

FILE: TURFING RVSR: LOCKLI;09/13,14:21

6/27/88

Conversation with Turf People.

(Mary Anne speaking to the old dude at counter)

this is probably angelo

Mary Anne: Yeah. I'm bringing in a lawn mower. It doesn't work.

Dude: Oh, well you've come to the right place.

MA: Yeah. Well, I need help to get it in.

D: Oh, we'll take care of that.

MA: Okay. Uh, I tried starting it up all morning, it's one of those pull things?

D: When did you have it tuned up last?

MA: It was . . .? (Shrugs) Somebody gave it to me.

D: Oh. Full service with that, (MA frowns) full service? (MA shakes head) You know, Tune Up?

MA: What about it? what do you mean?

Appendix I

D: Well, that's probably what you need.

MA: Well, it doesn't work at all, though.

D: Oh, alright.

Guy: (Other guy) I'll look at it.

Outside, MA walks with younger guy, about 5'7" average build, short brown hair parted down middle, wearing blue tee shirt, jeans, bandana, gold wrist chain. Guy doesn't strike me as having such a hot complexion. Looks about early to mid 30's.

MD: "You gonna help me with it?"

G: "yup."

MD: OK

(PAUSE)

MD: I wanted to cut the grass this morning, ya know?.

G: It wouldn't start?

MD: Yeah, It wouldn't do anything. I don't . . y'know.

MD: It's in here. (pointing to handle of lawn mower in trunk) This I managed to get off.

G: (With heavily feigned enthusiasm) It's a LAWN BOY!

Appendix I

M: Are they any good?

G: (Shrugs) Uh, they're alright.

* * *

ID: TURFING PAGE: 2

G: "Do you, uh. did you put this in or was it in already?

MD: I just got it like this. Why? What does it matter? Is there something in there that shouldn't be?

G: No. It's just.

MD: It probably needs gas, huh?

G: No, it's got gas in there. It depends how long it's been in there.

MD: Oh yeah?

G: You don't know how long they've had it?

MD: I have no idea. They just. They're moving and they gave it to me.

G: If it's been sitting in there for a long time . . . (something about setting in the carbuerator, getting mucked up inside, a plane is going overhead, drowns out part of what he's saying.) Well, probably needs a tuneup."

He plays around with the on-off switch, which is kind of loose

before I bring it in, but Bruce says it's okay, it works. He pulls the switch up and it comes off.

"This is broke."

"Broke?"

"Yeah. (he shows me the switch) See (inaud)

"Well, is it worth it for me to fix it? What do you think?

A tuneup is gonna run 60 dollars.

Uh huh.

The pull cord . . . (he pulls it rather gently upward and lets it retract several times) this looks like it might be okay. if it's not, it's going to be 25 dollars extra.

Extra?

Yeah.

Uh-huh.

This is broke on it. This. (he points to the switch)

It's weird cuz the thing was working a couple of weekends ago. Huh.

Yeah . . . See. That's the primer knob.

Appendix I

What's that do?

That turns it on, to start it. See, it's just spinning around. It's broken.

Hmmm.

How much would it cost to fix that? knob? Or you don't. I mean. Can you just check it over, and let me know what needs to be done and see if it's worth fixing, because, how much does a new one cost? you know. maybe i should just bag this idea. you know, if it's worth it for me to fix, I'll fix it. but if it's a piece of junk . . . i'll probably get a new one, then.

We'll have to take a look at it.

* * *

Appendix I

EXHIBIT F

FILE: TURFFAX RVSR: LOCKLI;09/13,13:51

Went into shop where Ray was 7/21/88. Lawnmowers are loud in the background.

M: "Hi, I came in to see how my lawnmower was doing. I didn't hear from you guys in a while."

R: (Walks over to counter, without saying anything. Looks in the schedule book. My name comes up on 6/27.) He pulls out the invoice and stares at it.

M: "SO what's the verdict?"

R: "I - I'm not sure. (to himself) George."

M: (George.) Ray walks into the back room where the mechanics are. I wait for about five minutes and take notes about the place inside.

On two sheets of letterhead paper, written in blue marker is a listing of their prices:

* * *

R: "What's your phone number again?"

M: "585-9088. It's right there. See?"
(MORE)

Appendix I

ID: TURFFAX PAGE: 2

R: "I know, but it's circled. I think they had trouble calling you at home."

M: "Yeah?"

R: "Yeah. See here? (Points again to invoice) He tried to call you at 7/16 and 7/18. No answer both days. Hmmm."

M: "What?"

R: "Looks like you need a tune up. That's $59.99. See. And Sharpen blades will run you $8.50. The shroud. That's the on-off switch. You can get away with not fixing that. Hmmm.

M: "So. That's like 70 bucks. I dunno. I'm still not sure if I'm going to buy a new one yet. I mean, I have to think about this. He didn't work on this already, did he?"

R: "Let me see. I don't know by this if he worked on it yet. (walks off to back room again, calls to someone) Hey, Joe?"

When he comes back, he points to the invoice again.

R: "No. He didn't."

M: "Oh. Alright. Then I'll take the machine with me today and bring it back when I decide."

R: "That's a $20 service fee."

M: "$20? Oh, right. That $20?"

R: "Yeah?"

Appendix I

M: "I can add that to the cost of my bill if you guys fix it, right?"

R: "What?"

M: "$20 goes towards the bill if I decide to bring it back to you guys?"

R: "Yeah."

* * *

ID: TURFFAX PAGE: 3

* * *

So I wait for the kid to finish cleaning off the Lawn Boy. While Ray and I are standing there, I said to him:

M: "So, it only really needed a tuneup, huh?"

R: "Yep."

M: "How did you get it to start up?"

R: (Shrugs) "It started up just fine for us."

M: "Yeah?"

R: "I guess being out here in the rain all that time did it some good."

M: "??"

Appendix I

Then the kid and Ray load the lawn mower into my Buick. The end.

* * *

Appendix I

EXHIBIT G

ID: LAWNTEST PAGE: 3

* * *

July 6 results

Took bobcat to Turf and gave same pitch as used in test. John Gloria was there, but was on phone, so Angelo dealt with me. When I asked if someone could look at the machine and tell me if it was worth fixing, he said, "You'll have to wait your turn," explaining that it would take three weeks and $20 for an estimate. I agreed to wait, but then got him to take a look at the machine. When I said it was supposed to be a good machine, but I couldn't get it started, he said, "It probably needs a tune-up." He looked briefly at machine, did not pull rope, said the machine looked good and was worth $500. He started to write down tuneup and blade sharpening, but I said no sharpening, I want to get out as cheap as I can. He said they will only charge for tuneup unless they call — if it needs valve job, it could be more than tuneup. Wrote down again that estimate was $20, but said this would not be charged if they did the tune-up.

Procedures here and perhaps Angelo's personality appear to have contributed to test results. At six other shops, intake person checked the machine and pronounced it in good shape. Here, Angelo seemed unwilling to do much more than glance at the machine and write up workorder. His personality is grouchy, maybe querulous.

Left machine in the name of Bruce Hoffman — just in case someone tips Gloria that I've been asking questions.

* * *

Appendix I

EXHIBIT K

FILE: MARKW RVSR: LOCKLI;09/13,13:33

. . . RW is 6 foot 1 210 lb Harley enthusiast with long hair and tatoos. He quit Gloria after a year but returned in 83 because he needed a job. John fired him when he caught him offering to do work on the side for Turf customers.

* * *

"When he worked for Bob, he was a nice guy. As soon as he took over, everything changed. He became cheap. He didn't want to know nothing about nothing. He always gave that smirky smile. I was ready to beat the crap out of him."

* * *

APPENDIX J — EXCERPTS OF REBUTTAL AFFIDAVIT OF JOHN L. GLORIA DATED JUNE 30, 1992 WITH EXHIBIT

JAFFE & SCHLESINGER, P.A.
8 Mountain Avenue
Springfield, NJ 07081
(201) 467-2246
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

Docket No. L-30435-89

Civil Action

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs,

vs.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARY ANNE DE MARCO, EDWARD MITCHELL d/b/a EDDIE'S POWER EQUIPMENT, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE and RICHARD ROE, INC.,

Defendants.

REBUTTAL AFFIDAVIT OF JOHN L. GLORIA IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Appendix J

STATE OF NEW JERSEY :
: ss:
COUNTY OF UNION :

JOHN L. GLORIA, of full age, having been duly sworn, upon his oath, according to law, deposes and says:

1. I am the individual named plaintiff in the above captioned lawsuit. I am also the president of Turf Lawnmower Repair, Inc. ("Turf"), an inactive corporation whose only significant asset is this lawsuit.

2. I make this rebuttal affidavit in response to the supplemental affidavit of defendant Bruce Locklin ("Locklin") dated June 25, 1992 wherein he attached two cassette tapes

* * *

the fact that he had rebuilt the carburetor of the Bobcat without any extra charge. The reference to "points" by Bob Miraglia was merely a reference to the ignition system of a lawn mower that he was required to check as part of the services provided by Turf in connection with a full tuneup.

s/ John L. Gloria

JOHN L. GLORIA

Sworn and subscribed to
before me this 30th day
of June, 1992.

s/ Dawn R. Mills
DAWN R. MILLS
A Notary Public of New Jersey
My Commission Expires October 12, 1994

Appendix J

EXHIBIT

REDLINED VERSION OF TRANSCRIPT 1
(starting at approximately 175)

175 Ray: It's worn out, the motor is worn.

Bruce: The motor is worn out.

Ray: Yeah, basically that's it. Sammy's the Lawn Boy mechanic. He knows them, he's been working on Lawn Boys for 20 years . . . it's shot.

Bruce: If I went back to Lawn Boy they wouldn't even fix it either?

Ray: ~~They wouldn't~~. How old is it?

Bruce: I don't know. My father-in-law — you see why I gotta know is because my father-in-law gave it to me.

Ray: Well, I don't think Lawn Boy can do anything for you only because this machine has gotta be at least ~~six~~ ten years old and, I mean, we could have got you for 50 - 60. Obviously the tune up might have held you for a week or two or three.

Bruce: But they could have got it started, they could have —

Ray: That's whit I mean, we couldn't even service the damn thing. I mean, we had it apart for hours, so you just got to throw it out.

Appendix J

Bruce: Would you throw it out for me here?

Ray: Oh, sure, if you want. I mean I'll be honest with you, I'll strip it for the head, and you know, for the ~~gaskets~~ gas tank and couldn't use the engine so I'll just fling it and I don't need (inaudible). You could ask him, I'm telling you I would just throw it away (inaudible).

Bruce: I don't think —

Ray: I mean, if you don't want it — I mean, if you want it you can take it. I mean, I don't need it. You are going to ~~can~~ give me $20 for the service charges. If you want the machine by all means, if you want to keep it even for the ~~day~~ deck. I mean, it's useless, but I'm only trying to tell you if you want to throw another engine on there at least you ~~should~~ have a deck. If you want to buy an old deck from me it would cost ~~25~~ 35 - 50 bucks. Doug . . .(trails off)

APPENDIX K — EXCERPTS OF SUPPLEMENTAL AFFIDAVIT OF BRUCE LOCKLIN DATED JUNE 25, 1992 WITH EXHIBIT B

* * *

2. This supplemental affidavit is submitted in further support of the motion for summary judgment filed by the Record defendants.

3. In connection with my investigation of Turf Lawnmower Repair, I wore a hidden tape recorder both when I picked up my Lawnboy lawn mower on June 3, 1988 and when I picked up the Record's Bobcat lawn mower on August 3, 1988. The tapes recorded, in part, my conversations with Turf personnel.

4. Copies of the tapes, along with transcripts of my dialogues with Turf personnel, were provided to plaintiffs in discovery. I have compared the transcripts with the tape recordings and find each transcript to be an accurate transcription of the portion of the tape which it reduces to writing. (A copy of the August 3, 1988 tape recording and transcript are attached hereto as Exhibit "A".) (A copy of the June 3, 1988 tape recording and transcript are attached hereto as Exhibit "B".)

s/ Bruce Locklin
Bruce Locklin

Sworn to and subscribed
before me this 25th day
of June, 1992.

s/ Mary J. Guatta
MARY J. GUATTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Dec., 1995

Appendix K

EXHIBIT B

TRANSCRIPT OF TAPE 1 (starting at approximately 175)

175 Ray: It's worn out, the motor is worn.

Bruce: The motor is worn out.

Ray: Yeah, basically that's it. Sammy's the Lawn Boy mechanic. He knows them, he's been working on Lawn Boys for 20 years . . . it's shot.

Bruce: If I went back to Lawn Boy they wouldn't even fix it either?

Ray: They wouldn't.

Bruce: I don't know. My father-in-law — you see why I gotta know is because my father-in-law gave it to me.

Ray: Well, I don't think Lawn Boy can do anything for you only because this machine haa gotta be at least six years old and, I mean, we could have got you for 50 - 60. Obviously the tune up might have held you for a week or two or three.

Bruce: But they could have got it started, they could have —

Ray: That's what I mean, we couldn't even service the damn thing. I mean, we had it apart for hours, so you just got to throw it out.

Bruce: Would you throw it out for me here?

Appendix K

Ray: Oh, sure, if you want. I mean I'll be honest with you, I'll strip it for the head and, you know, for the gaskets and couldn't use the engine so I'll just fling it and I don't need (inaudible). You could ask him, I'm telling you I would just throw it away (inaudible).

Bruce: I don't think —

Ray: I mean, if you don't want it — I mean, if you want it you can take it. I mean, I don't need it. You can give me $20 for the service charges. If you want the machine by all means, if you want to keep it even for the day. I mean, it's useless, but I'm only trying to tell you if you want to throw another engine on there you should have a deck. If you want to buy an old deck from me it would cost 25 - 50 bucks. Doug . . . (trails off)

APPENDIX L — LETTER TO SUPERIOR COURT JUSTICE MARGUERITE T. SIMON WITH EXHIBIT B

LAW OFFICES
JAFFE SCHLESINGER, P.A.
8 MOUNTAIN AVENUE
SPRINGFIELD, NEW JERSEY 07081-1788
(201) 467-2246
TELECOPIER (201) 467-5708

OUR FILE NO. 2787

July 7, 1992

Honorable Marguerite T. Simon
Superior Court Of New Jersey
10 Main Street
Hughes Justice Complex
Hackensack, New Jersey 07601

Re: *Turf Lawnmower Repair, Inc., et al. v. Bergen Record Corporation, et al.*
Docket No. L-30435-89

Dear Judge Simon:

Pursuant to your request, enclosed please find a transcript of an excerpt of a conversation held between defendant Bruce Locklin and Ray, an employee of plaintiff Turf on June 3, 1988. This transcript was prepared by plaintiffs' counsel after observing discrepancies between the cassette tape recording of this conversation and the alleged transcript of the conversation attached as Exhibit "B" to the June 25, 1992 supplemental affidavit of Bruce Locklin.

Appendix L

In addition to correcting errors made by the defendants, the enclosed transcript encompasses a larger excerpt of the June 3, 1988 conversation. The transcript of the conversation was extended because we believe the court will find the discussion regarding the potential purchase of a new lawn mower by defendant Locklin to be instructive.

Sincerely yours,

JAFFE & SCHLESINGER, P.A.
s/ Robert H. Jaffe
Robert H. Jaffe

RHJ: 1039:ao
Enclosures
CC: Peter G. Banta, Esq.
Mr. John Gloria

Appendix L

EXHIBIT B

TRANSCRIPT OF EXCERPT OF CONVERSATION BETWEEN BRUCE LOCKLIN AND TURF EMPLOYEE ON JUNE 3, 1988

Ray: It's worn out, the motor is worn.

Bruce: The motor is worn out.

Ray: Yeah, basically that's it. Sammy's the Lawn Boy mechanic. He knows them, he's been working on Lawn Boys for 20 years . . . it's shot.

Bruce: If I went back to Lawn Boy they wouldn't even fix it either?

Ray: How old is it?

Bruce: I don't know. My father-in-law — you see why I gotta know is because my father-in-law gave it to me.

Ray: Well, I don't think Lawn Boy can do anything for you only because this machine has gotta be at least ten years old and, I mean, we could have got you for 50 - 60. Obviously the tune up might have held you for a week or two or three.

Bruce: But they could have got it started, they could have —

Ray: That's what I mean, we couldn't even service the damn thing. I mean, we had it apart for hours, so you just got to throw it out.

Appendix L

Bruce: Would you throw it out for me here?

Ray: Oh, sure, if you want. I mean I'll be honest with you, I'll strip it for the head, and you know, for the gas tank and couldn't use the engine so I'll just fling it and I don't need (inaudible). You could ask him, I'm telling you I would just throw it away (inaudible).

Bruce: I don't think—

Ray: I mean, if you don't want it —I mean, if you want it you can take it. I mean, I don't need it. You are going to give me $20 for the service charges. If you want the machine by all means, if you want to keep it even for the deck. I mean, it's useless, but I'm only trying to tell you if you want to throw another engine on there at least you have a deck. If you want to buy an old deck from me it would cost 35 - 50 bucks. Doug . . . (trails off)

Ray: Doug, if you need help you can have John's help to move things around.

Bruce: What kind of deal can you give me on a new lawnmower?

Ray: Well.

Bruce: See.

Ray: What I would do for you on a new lawnmower is that I would eat the $20 service charge.

Bruce: But, but.

Appendix L

Ray: The $20 I will put towards a new mower.

Bruce: — I'm looking for a cheap —

Ray: The cheapest deal I could give you.

Ray: Well, Okay, the cheapest deal I could give you is a side shute which is over by this wall and it's a Roper and right there it's $159.

Bruce: And the bag is extra for that?

Ray: The bag is extra.

Ray: The cheapest one is like $200 — five years parts and labor. I will — five years you have three and one half horsepower side —. That's the cheapest — if you wanna go to a rear bagger like that Roper is $269.

Bruce: $269?

Ray: Three and one half horsepower side shoot briggs engine and I mean this is —

Bruce: Which Roper is this, is this, is this that it?

Ray: It's this one here 20" wide.

Bruce: That kind of bag on it.

Ray: That's the bag, that's the Roper bag.

Bruce: This is $250.

Appendix L

Ray: $249.99 right $250.00 and it's baby brother is $159.99.

Ray: Without the bag.

Bruce: And then you're going to take the $20.

Ray: And I'll take the $20 service charge that you would give me off towards the new machine, then I'll just junk that. You'll have to understand, you'll have to give me $20 so you're not paying me for this.

Bruce: Right.

APPENDIX M — EXCERPTS OF DEPOSITION OF MARY ANNE DE MARCO DATED MAY 7, 1990

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY
DOCKET NO. W-30435-89

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation, and JOHN L. GLORIA,

Plaintiffs,

-vs-

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARY ANNE DE MARCO, MARK WINNERS, ROBERT VROENINDAY, DOUGLAS LIVINGSTON, JOHN DOE and RICHARD ROE, INC.,

Defendants.

DEPOSITION OF:

MARY ANNE DE MARCO

Monday, May 7, 1990
Hackensack, New Jersey

APPEARANCES:

MESSRS. JAFFE & SCHLESINGER
BY: ROBERT H. JAFFE, ESQ.,
Attorneys for the Plaintiffs

MESSRS. WINNE, BANTA, RIZZI, HETHERINGTON & BASRALIAN

Appendix M

BY: PETER G. BANTA, ESQ.,
Attorneys for the Defendants Bergen Record,
David Hall, Byron Campbell, Bruce Locklin and
Mary Anne De Marco

MESSRS. REM & REM
BY: JOSEPH P. REM, JR., ESQ.,
Attorneys for the Defendants Mark Winners,
Robert Vroeninday and Douglas Livingston

ROSEMARIE SPINELLI
Certified Shorthand Reporter

* * *

[3] TRANSCRIPT of testimony taken by and before ROSEMARIE SPINELLI, C.S.R., a Notary Public and Certified Shorthand Reporter of the State of New Jersey, at the offices of Messrs. Winne, Banta, Rizzi, Hetherington & Basralian, 25 East Salem Street, Hackensack, New Jersey, on Monday, May 7, 1990 at 12:45 p.m., pursuant to notice.

* * *

[86] Q. Page 3 of DeMarco-3 with the question stated to you.

"There's a 20-dollar service charge, you know, if you decide not to get the work done," and didn't you answer "All right. That sounds good"?

A. Yes.

Q. Therefore, you encouraged them to go forth and review the machine, did you not?

A. Yes.

Q. And didn't they also tell you that to be honest with you it would take two to three weeks to do the diagnostic test?

A. Yes.

Q. Did they also advise you that if you needed a lawn mower they'll lend you one for nothing?

A. Yes.

Q. Where is that in the article?

A. I did not write the article.

* * *

[103] MR. JAFFE: I'll take your question.

Q. Based on your experience, were you charged for work that wasn't done?

MR. BANTA: You can answer.

A. Okay. I believe I was — the question again, please?

(Whereupon the prior question was read back by the reporter.)

A. Based on my experience, no.

* * *

APPENDIX N — LETTER TO SUPERIOR COURT JUSTICE MARGUERITE T. SIMON DATED JUNE 9, 1992 WITH ENCLOSURE

WINNE, BANTA, RIZZI, HETHERINGTON &
BASRALIAN, P.C.
COUNSELLORS AT LAW
COURT PLAZA NORTH
25 MAIN STREET
P.O. BOX 647
HACKENSACK, NEW JERSEY 07602
TELECOPIER (201) 487-8529
(201) 487-3800

July 9, 1992

Honorable Marguerite T. Simon
Superior Court of New Jersey
Justice Center – 10 Main Street
Hackensack, New Jersey 07601

Re: Turf Lawnmower, et al. vs.
Bergen Record Corp., et al.

Dear Judge Simon:

We have reviewed the "larger" excerpt of the conversation between Bruce Locklin and Ray, an employee of Turf, on June 3, 1988, as provided by plaintiffs' counsel to the Court earlier this week. While we believe that the transcript has some minor errors, we accept plaintiffs' version for purposes of this motion. However, we are providing a transcript of the remainder of the discussion regarding the possible purchase of a new lawnmower, which was not included in plaintiffs' expanded transcript. We believe that the entire transcript, especially if reviewed while listening to the tape, will be of greater assistance to the Court.

Appendix N

Our original transcript was chosen to match Locklin's notes of the conversation. Once we go beyond that, we feel the transcript of the entire conversation should be before the Court.

Respectfully,

s/ Peter G. Banta
Peter G. Banta

PGB:mg
Enclosure

cc: Jaffe & Schlesinger

Appendix N

TAPE 1 (Continued)

Ray: And then I'd just junk that . . . so you have to understand you would have to give me $20 so you're not paying me for this.

Bruce: Right.

Ray: So I'd just write this up at 249.99. That's how it goes, right? I mean I'm going to double it now, so understand what I'm saying.

Bruce: All right, double it, double it.

Ray: Actually I'd be giving you $40.

Bruce: Yeah, I would double it.

Ray: Now make sure, the English language is strange, and money is strange.

Bruce: Yeah.

Ray: Let's get it straight.

Bruce: Yeah.

Ray: If you took $20 out of your pocket, you go like this and it's over, right?

Bruce: Yeah.

Appendix N

Ray: If you want to take this machine, this is over and done with now. This machine is still going to cost you $249.99. So you're not paying . . . You'd be paying 269. You understand what I'm saying?

Bruce: Yes.

Ray: Think of it. So you're, I don't want to mislead you. You're not going to pay for this.

Bruce: Ok, how about this. How about I give you 20, I take that machine, I come back.

Ray: And you buy this for $249.99?

Bruce: Will you give me my 20 back? [inaudible] Let me think about it. Let me look around and see if I can get any offers [inaudible].

Ray: Yeah, that's fine but just the same thing. I'm just going to give you $20 back.

Bruce: All right and I'll get this one ok that's better [inaudible].

Ray: All right, and I'm here [inaudible].

APPENDIX O — AFFIDAVIT OF HAMPDEN H. SMITH DATED MAY 20, 1992 WITH EXCERPTS OF EXHIBIT A

JAFFE & SCHLESINGER, P.A.
8 Mountain Avenue
Springfield, NJ 07081
(201) 467-2246
Attorneys for Plaintiffs
Turf Lawnmower Repair, Inc.
and John L. Gloria

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

Docket No. L-30435-89

Civil Action

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs,

vs.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARY ANNE DE MARCO, EDWARD MITCHELL d/b/a EDDIE'S POWER EQUIPMENT, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE and RICHARD DOE, INC.,

Defendants.

AFFIDAVIT OF HAMPDEN H. SMITH IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Appendix O

STATE OF VIRGINIA :
: ss.
CITY OF LEXINGTON :

HAMPDEN H. SMITH, III of full age, having been duly sworn, upon his oath, according to law, deposes and says:

1. I am the Head of the Department of Journalism at Washington and Lee University in Lexington, Virginia and have been an assistant, associate and full professor of journalism at Washington and Lee since 1974.

2. Counsel for plaintiffs Turf Lawnmower Repair and John L. Gloria retained me on or about March 28, 1991 to critically review and analyze an article entitled "A Clip Joint for Lawnmowers" and a subarticle entitled "Looking for Honesty With a Faulty Machine" that appeared in *The Bergen Record* on Sunday, August 21, 1988.

3. My report containing the findings of my analysis of the August 21, 1988 articles and the investigatory and journalistic methods implemented to prepare these articles was submitted in the form of a letter to plaintiffs' counsel dated May 28, 1990.

4. A copy of this report is attached to this affidavit as Exhibit "A".

s/ Hampden H. Smith, III
Hampden H. Smith, III

Sworn and subscribed before
me on this 20 day of
May, 1992.
s/ Sharon Edwards

Appendix O

EXHIBIT A

Hampden H. Smith III
Communications Services
304 South Jefferson Street Lexington, Va. 24450
(703) 463-8434 463-5463

May 28, 1990

Jaffe & Schlesinger, P.A.
8 Mountain Ave.
Springfield, N.J. 07081

Report regarding *Turf Lawnmower Inc. et al. v. Bergen Record Corp. et al.*

Dear Mr. Jaffe and Mr. Devero:

From the first, cursory glance at the Bergen Record's story maligning the operation of Turf Lawn Mower Repair Inc. to a careful reading of the depositions of the defendants, it is unquestionable that the Bergen Record and its employees, Bruce Locklin, Mary Anne De Marco and David Hall, failed to follow universally accepted journalistic standards in a number of instances in the preparation of the article headlined "A clip joint for lawn mowers." As a result of these lapses in the following journalistic standards, the story did not support its characterizations of Turf Lawn Mower Repair Inc. and its owner, John Gloria, as being involved in conscious, concerted rip-offs of customers, uniquely involved in deceitful business practices.

* * *

Appendix O

The story continues in the same overwrought vein, throwing unsubstantiated charges about with abandon and giving the reader no clue regarding why the story originated. John Gloria is characterized as a "fiercely ambitious" 29-year-old who has already made $1.5 million. The implication is he pocketed that princely sum in three years through "flawed" dealings at Turf Lawn Mower Repair. The reader is never told that most of that figure is from real estate transactions.

* * *

s/ Hampden H. Smith, III

APPENDIX P — AFFIDAVIT OF MICHAEL J. DIGNAN DATED MAY 25, 1992 WITH EXHIBITS

JAFFE & SCHLESINGER, P.A.
8 Mountain Avenue
Springfield, NJ 07081
(201) 467-2246
Attorneys for Plaintiffs
Turf Lawnmower Repair, Inc.
and John L. Gloria

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

Docket No. L-30435-89

Civil Action

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs,

vs.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARY ANNE DE MARCO, EDWARD MITCHELL d/b/a EDDIE'S POWER EQUIPMENT, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE, and RICHARD ROE, INC.,

Defendants.

Appendix P

AFFIDAVIT OF MICHAEL J. DIGNAN IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK :
: ss.
COUNTY OF ALBANY :

MICHAEL J. DIGNAN, of full age, having been duly sworn, upon his oath, according to law, deposes and says:

1. I am the district sales and service manager for the distribution, sales and service division of the Briggs and Stratton Corporation, manufacturer of small gasoline engines utilized by various lawn mower manufacturers including Snapper, Bobcat, Toro and Sears.

2. I have been involved with the sales and service of gasoline engine powered equipment for more than ten years including employment as a district sales and service representative with Tecumseh Power Products and service manager for Able Tractor and Equipment Company.

3. Counsel for plaintiffs Turf Lawnmower Repair and John L. Gloria retained me on or about July 12, 1990 to prepare two reports. The first report discussed the standards applicable to lawn mower and power equipment repair shops during the 1986-1988 period and the second report detailed my findings after inspecting the Lawn•Boy and Bobcat lawn mowers allegedly used by Bergen Record reporter Bruce Locklin as part of "tests" designed by Locklin to serve as the basis for an August 21, 1988 *Bergen Record* article entitled "A Clip Joint for Lawn Mowers" and a subarticle entitled "Looking for Honesty with a Faulty Machine."

Appendix P

4. My reports discussing the lawn mower repair industry and my inspection of the aforementioned Lawn•Boy and Bobcat lawn mowers were submitted in the form of a letter to plaintiffs' counsel dated August 8, 1990 and a memorandum dated July 10, 1990.

5. A copy of my August 8, 1990 report concerning standard in the lawn mower and power equipment industry is attached as Exhibit "A".

6. A copy of my July 10, 1990 report, settling forth my findings after inspecting the Lawn•Boy and Bobcat lawn mowers is attached as Exhibit "B".

s/ Michael J. Dignan
Michael J. Dignan

Sworn to and subscribed
before me this 25th day
of May, 1992.

s/ Victor L. LaPlante
VICTOR L. LA PLANTE
Notary Public, State of New York
Residing in Albany County
Commission Expires May 4, 1994

Appendix P

EXHIBIT A

MICHAEL J. DIGNAN
14 Winthrop Avenue
Latham, New York 12110

August 8, 1990

Robert H. Jaffe, Esq.
Jaffe & Schlesinger, P.A.
8 Mountain Avenue
Springfield, New Jersey 07081

Re: *Turf Lawnmower Repair, et al. v. Bergen Record Corp., et al.*
Docket No. L-30435-89

Dear Mr. Jaffe:

You have asked the undersigned to prepare an expert report with respect to standards applicable to the operation of lawn mower and power equipment repair shops during the years 1986 through 1988 to be submitted to counsel for the defendants in the above referenced lawsuit. You also asked me to review a certain article entitled "A Clip Joint for Lawn Mowers" with a subheading entitled "Tests, ex-workers reveal Teaneck shop deceives, overcharges" which appeared on the front page of the August 21, 1988 Sunday edition of *The Bergen Record.*

* * *

5. Was it a standard operating practice for a lawn mower repair shop to disconnect the spark plug wire while moving the

machine to the repair area or when returning the serviced lawn mower or power equipment to the customer?

ANSWER:

Yes. There is no question but that employees of a lawn mower repair shop should disconnect the spark plug on a machine brought in for servicing immediately if the customer has not already done so. In this connection, I am aware that the Outdoor Power Equipment Institute, Inc. has prepared a chart of basic maintenance/safety tips to be followed by owners of outdoor power equipment including rotary lawn mowers. Among the basic safety tips in the following recommended procedure: always turn off the engine and disconnect the spark plug wires before attempting to unclog or work on outdoor power equipment. The same Institute also specifically recommends that spark plug wires should be disconnected on walk behind rotary lawn mowers "before cleaning mower housing, making repairs, or making routine inspections." These are safety procedures which, if not followed, would be reason to criticize personnel of a lawn mower repair shop for failing to disconnect spark plug wires before moving equipment to a repair area or returning the machine to the customer after servicing.

* * *

In short, based on my examination of the documents provided and my physical examination of the actual lawn mowers that were the subject of the "test" described in the August 21, 1988 article, it is my opinion that, to characterize

the procedures used by Turf as a "clip joint" or in the nature of deceitful practices, is not supported by the facts.

Very truly yours,

s/ Michael J. Dignan
Michael J. Dignan

OCT 10 1995

No. 95-424

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC., and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DE MARCO, DAVID HALL and BYRON CAMPBELL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

MOTION OF NEW JERSEY PRESS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN OPPOSITION TO PETITION AND BRIEF *AMICUS CURIAE*

THOMAS J. CAFFERTY
Counsel of Record
MCGIMPSEY & CAFFERTY
Attorneys for Amicus Curiae
New Jersey Press Association
285 Davidson Avenue
Somerset, New Jersey 08873
(908) 560-1900

7346
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

No. 95-424

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC. and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DEMARCO, DAVID HALL and BYRON CAMPBELL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

MOTION OF NEW JERSEY PRESS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN OPPOSITION TO PETITION

The New Jersey Press Association hereby moves, pursuant to Rule 37-2, for leave to file a brief *amicus curiae* in opposition to the petition for a writ of certiorari to the Supreme Court of New Jersey. The Petitioners, Turf Lawnmower Repair, Inc., and John L. Gloria, have declined to consent to the filing of this brief, Respondents, Bergen Record Corporation, Bruce Locklin, Mary Anne DeMarco, David Hall and Byron Campbell, have consented to the filing. A copy of the proposed *amicus* brief is attached.

The New Jersey Press Association is a non-profit organization incorporated in 1857 under the laws of the State of New Jersey. The NJPA membership includes 22 daily newspapers, 139 weekly newspapers, 2 college newspapers as well as corporate and individual members.

The New Jersey Superior Court, Appellate Division and the New Jersey Supreme Court granted the Press Association leave to appear as *amicus* in this matter in both those courts.

The New Jersey Supreme Court decision, based upon New Jersey common law, defines the ability of New Jersey newspapers to report upon matters affecting the public interest without fear of a judgment in a defamation action. As the major trade organization for New Jersey Newspapers, the New Jersey Press Association is uniquely positioned to address issues from the perspective of the newspaper publishing industry. It seeks to file the proposed brief and believes the brief could assist this Court.

It is respectfully requested that the Court grant leave to file the attached brief of the *amicus*, New Jersey Press Association.

Respectfully submitted,

THOMAS J. CAFFERTY
Counsel of Record
MCGIMPSEY & CAFFERTY
Attorneys for Amicus Curiae,
New Jersey Press Association
285 Davidson Avenue
Somerset, New Jersey 08873
(908) 560-1900

Dated: October 10, 1995

QUESTIONS PRESENTED

1. Was the decision of the New Jersey Supreme Court consonant with New Jersey common law and the principles of equal protection?

2. Was the imposition of the actual malice standard by the New Jersey Supreme Court in accordance with New Jersey common law?

LIST OF ALL PARTIES

The plaintiffs below were Petitioners Turf Lawnmower Repair, Inc. and John L. Gloria, individually (collectively "plaintiffs").

The defendants below included Respondents Bergen Record Corporation, Bruce Locklin, Mary Anne DeMarco, Byron Campbell, and David Hall (collectively "defendants").

Other defendants below also were Edward Mitchell, d/b/a Eddie's Power Equipment, Mark Winners, Robert Vroeginday, Douglas Livingston, John Doe and Richard Roe. The defendants were dismissed by plaintiffs at various points of the proceedings.

The New Jersey Press Association appeared as *amicus curiae* in the Superior Court of New Jersey Appellate Division and in the Supreme Court of New Jersey.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of All Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Summary of the Argument	4
Reasons for Denying the Writ	4
I. The judgment of the New Jersey Supreme Court was based on New Jersey common law and does not infringe on any federal laws or federal rights.	4
II. The use of the phrase "actual malice" by the New Jersey Supreme Court, even if inconsistent with this Court's definition of that term, offends no federal laws or rights.	12

Contents

Page

III. The New Jersey Supreme Court properly decided both John Gloria and his closely held corporation were required to prove actual malice. 14

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 516 A.2d 220 (1986) 5, 6, 7, 8, 12

Gertz v. Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) 9, 10, 11

Lindsey v. Normet, 405 U.S. 56 (1972) 11

New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) 11

Paul v. Davis, 424 U.S. 693 (1976) 11

Sisler v. Gannett Co., 104 N.J. 256, 516 A.2d 1083 (1986) 8, 9, 11

Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 655 A.2d 417 (1995) 2, 5, 9, 10, 11, 12, 14

Statute Cited:

28 U.S.C. § 1257(a) 2

Contents

Page

United States Constitution Cited:

First Amendment 2, 11

Fourteenth Amendment, Section 1 2

Other Authority Cited:

Robert D. Sack, *Libel, Slander, and Related Problems*, 443-444 12

No. 95-424

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC. and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DEMARCO, DAVID HALL and BYRON CAMPBELL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE, NEW JERSEY PRESS ASSOCIATION IN OPPOSITION TO PETITION

TO THE HONORABLE SUPREME COURT:

The *amicus curiae,* New Jersey Press Association, respectfully requests that this Court deny the petition for writ of certiorari submitted by Petitioners, Turf Lawnmower Repair, Inc. and John L. Gloria.

OPINIONS BELOW

On March 15, 1995 the New Jersey Supreme Court affirmed the judgment of the Superior Court of New Jersey, Appellate Division, and the judgment of the trial court granting Respondents summary judgment. The decision of the New Jersey Supreme Court is reported at 139 N.J. 392, 655A.2d 417(1995).

Following issuance by the New Jersey Supreme Court of its opinion, Turf Lawnmower Repair, Inc. and John L. Gloria moved for a rehearing for reconsideration. The New Jersey Supreme Court denied that request in an unreported decision dated June 6, 1995.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the March 15, 1995 judgment of the Supreme Court of New Jersey is invoked under 28 U.S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1, provides as follows:

> All persons born or naturalized in the United States, and subjects to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE

On August 21, 1988, the *Record* published an article entitled "A Clip Joint For Lawn Mowers." The article critically described the operations of Turf Lawnmower Repair, Inc., whose owner, Petitioner, John Gloria, was honored by the Small Business Administration in 1986 as New Jersey's Young Entrepreneur of the Year as a result of Turf's success. The article was the culmination of an investigation conducted by the author, Bruce Locklin, which consisted of interviews with John Gloria, former employees of Turf, customers of Turf, other shop owners, and performance tests conducted at various repair shops.

Petitioners filed suit on January 18, 1989, asserting defamation claims[1] based upon an August 21, 1988 article in the *Record*.

On March 31, 1992, *The Bergen Record* defendants moved for summary judgment. By order dated July 29, 1992, the Respondents' summary judgment motion was granted.

---

1. Tortious interference claims were dismissed by the trial court without appeal. RICO claims were withdrawn by Petitioners. Claims against various sources of *The Bergen Record* were voluntarily dismissed by Petitioners.

Petitioners filed a Notice of Appeal on September 11, 1992 and on January 3, 1994, the Appellate Division affirmed. In February of 1994, Petitioners petitioned the New Jersey Supreme Court for certification. In April 1994, the New Jersey Supreme Court granted certification.

In May of 1994, the New Jersey Press Association moved before the New Jersey Supreme Court for leave to appear as *amicus curiae,* which motion was granted July 15, 1994.

On March 15, 1995 the New Jersey Supreme Court affirmed the judgment of the Superior Court of New Jersey, Appellate Division. On June 6, 1995 the New Jersey Supreme Court denied Petitioners' application for reconsideration.

SUMMARY OF THE ARGUMENT

There exists no basis for this Court to grant the writ inasmuch as the New Jersey Supreme Court decided this case as a matter of New Jersey common law which decision offends no federal laws or rights.

REASONS FOR DENYING THE WRIT

I.

THE JUDGMENT OF THE NEW JERSEY SUPREME COURT WAS BASED ON NEW JERSEY COMMON LAW AND DOES NOT INFRINGE ON ANY FEDERAL LAWS OR FEDERAL RIGHTS.

After discussing the evolution of federal constitutional libel law (Pet. App. B, 13a-16a) and noting that ". . . , *Gertz* continued to allow each State to define its own appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods

injurious to a private person. *Id.* at 347, 94 S. Ct. at 3010-3011, 41 L. Ed. 2d at 809." (Pet. App. B, 15a) the New Jersey Supreme Court addressed the appropriate standard of fault for private libel plaintiffs to recover against a media defendant in New Jersey when the subject matter of the speech is of public concern. The New Jersey Supreme Court had, previous to this case, recognized the tensions at issue in arriving at an appropriate standard of fault. "The evolution of the law of defamation reflects the tension between society's competing interest in encouraging the free flow of information about matters of public concern and in protecting an individual's reputation." *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 135-36, 516 A.2d 220 (1986). The decision in *Turf Lawnmower Repair, Inc.* represents one more step along the path that the New Jersey Supreme Court commenced charting in *Dairy Stores, supra,* establishing the appropriate standard of fault that a private libel plaintiff must meet as a matter of New Jersey law.

In *Dairy Stores*, a local newspaper had written a series of articles regarding the sale of "spring water" by the plaintiff. The newspaper had taken the water to an independent state-certified testing laboratory which, after advising the reporter that the retailer of the water was a customer of the laboratory, tested the water and reported it did not contain chlorine. The reporter, skeptical of the results, thereafter took the bottle to another laboratory whose laboratory director, after conducting tests, opined that the "spring water" either was not from a spring or the spring was contaminated with chlorine. The reporter then took a second bottle to a third laboratory, whose report the reporter did not understand. After publication of the articles, *Dairy Stores* brought suit for defamation. Upon completion of discovery, the trial court dismissed the action on defendant's motion for summary judgment, imposing the actual malice standard of liability. In determining the standard of liability of a newspaper, its reporter and an independent laboratory retained by them for

statements that allegedly defamed the plaintiff corporation's reputation and disparaged its product, the New Jersey Supreme Court, pursuant to New Jersey common law, adopted an actual malice standard stating:

> Although constitutional considerations have dominated defamation law in recent years, the common law provides an alternative, and potentially more stable, framework for analyzing statements about matters of public interest.
>
> Another reason for turning to the common law is that the constitutional concepts do not comfortably fit the activities or products of a corporation. As the Law Division noted, the term "public figure" does not readily apply to corporate enterprises, and "public controversy" is poorly suited to describe the commercial activities of such an enterprise. 191 *N.J. Super.* at 212-213. The term "public figure" includes individuals who engage in a public controversy and ill fits a corporation, which ordinarily is interested not in thrusting itself into such a controversy, but in selling its product.

Dairy Stores, at 139.

The New Jersey court rejected the concept of a corporation as a public figure as an "awkward and uncertain method of determining whether statements about corporations or their products are actionable." *Dairy Stores, supra*, at 140. The court then found the common law qualified privilege of fair comment on matters of public concern applicable to that action.

> Because the present case involves a product that is unquestionably a matter of legitimate public concern, we believe it is more prudent to extend that standard for the time being only to such products, leaving to another day the determination whether the standard should apply to statements about all products no matter how prosaic or innocuous.

Dairy Stores, at 146.

In determining that the article constituted fair comment, the New Jersey Supreme Court imposed the actual malice standard.

> A qualified or conditional privilege has emerged as one of the prime means for the common law to balance the interests in reputation with the publication of information in the public interest.

Dairy Stores, at 137.

The New Jersey Supreme Court then provided a measure of guidance for determining what constituted matters of "legitimate public concern."

> We recognize that no everything that is newsworthy is a matter of legitimate public concern, and that sorting such matters from those of a more private nature may be difficult. In this regard, the assessment of public interest includes a determination whether the person "voluntarily and knowingly engaged in conduct that one in his position should reasonably know would

> implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny." *Sisler v. Gannett Co., Inc.*, 104 N.J. 256, 274 (1986).

Dairy Stores, at 144.

Looking to decisions of other courts, the New Jersey Supreme Court provided a short list of examples of matters of public concern:

> . . . essentials of life as food and water . . . widespread effects of a product . . . substantial government regulation of business activities and products . . .

Dairy Stores, supra, at 144-145.

The New Jersey Supreme Court in *Dairy Stores, supra*, at 145 specifically left "to the future a more complete definition of matters of legitimate public concern." *See also Sisler v. Gannett Co.*, 104 N.J. 256, 516 A.2d 1083 (1986).

Sisler involved a retired banker who had loans from a bank of which he had been a founder and former president. A newspaper published a story asserting that the banker had received under-collateralized loans from the bank to finance his horse farm. After determining that the plaintiff was neither a public figure nor a limited public figure our Supreme Court found that an actual malice standard should nonetheless govern the case holding that ". . . when a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity, defamatory

speech that focuses upon that public interest will not be actionable unless it has been published with actual malice." *Sisler, supra,* at 279, 516 A.2d 1083.

In *Turf*, the New Jersey Supreme Court stated:

> In *Dairy Stores* and *Sisler* we constructed a test to reflect public policy considerations often ignored in other States. (citations omitted) In those cases we sought to protect speech that affects the health and safety of the citizenry or involves a highly regulated industry.

Turf, supra (Pet. App. B, 23a).

Thus, the New Jersey Supreme Court in *Turf* further travelled the road left open to the states by this Court in *Gertz.*

In further explicating the New Jersey standard of liability for a private libel plaintiff, the New Jersey Supreme Court in *Turf* focused on the nature of the speech involved in determining whether a private libel plaintiff must meet a standard greater than negligence. In holding that where speech alleges consumer fraud that concerns a legitimate public interest a plaintiff must establish actual malice, the New Jersey Supreme Court stated:

> No hard and fast rules exist to determine whether alleged consumer fraud conduct reported in a newspaper article raises a matter of public concern sufficient to trigger the actual-malice standard. What constitutes consumer fraud depends not on the manner of investigation employed by the media to capture the story, but generally on whether

> the alleged activities of the business would constitute a cause of action under the "Consumer Fraud Act". Moreover, the article must deal primarily with consumer fraud viewed as a whole in light of all surrounding circumstances. If the court determines that substantially all the allegations set forth in the article, if true, would support a consumer fraud complaint, then the actual-malice standard will apply.

Turf, supra (Pet. App. B, 32a).

Petitioners urge this Court grant the writ, asserting that the decision of the New Jersey Supreme Court, which clearly and unequivocally was based upon New Jersey common law and the New Jersey State Constitution, ". . . impermissibly grants media defendants the right to control, in violation of plaintiffs' right to equal protection of the law, the application of the governing standard in a defamation action. By their editorial selectivity regarding the content of their article, defendants created a public controversy and then relied on the resulting public interest to assert the benefits of the state law privilege." (Pet. for Cert. at 4).

In support of this proposition Petitioners wrongfully assert that ". . . it remains a vital fact of constitutional law that once a state establishes such a standard, it must apply that standard in remedy equally to all individuals, mindful of their federally protected rights to maintenance of their good name and reputation, and of their rights to equal protection of law." (Pet. for Cert. at 9). The simple fact is that in *Gertz* this Court recognized that the protection of individual reputations is left primarily to the individual states when this Court stated, "the legitimate State interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory

falsehoods. We would not lightly require the State to abandon this purpose. . . ." *Gertz, supra*, at 341. *See also Paul v. Davis*, 424 U.S. 693 (1976).

Not only is the interest in compensating individuals for harm inflicted upon them by defamation primarily one of legitimate state interest, Petitioners also err when they assert that once a standard is established that standard must be applied equally to all individuals.

In support of its argument Petitioners cite *Lindsey v. Normet*, 405 U.S. 56 (1972). The import of *Lindsey, supra,* however, is its teaching that it is not mere classification that runs afoul of the equal protection clause but arbitrary or capricious classif ication. *Lindsey, supra,* at 77. New Jersey has chosen to establish a standard of fault in libel cases based upon the nature of the speech involved, holding that certain speech affecting public interest is entitled to a greater degree of protection than other types of speech. Indeed this Court has made the very same distinctions under the First Amendment. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, (1964) and its progeny.

In *Sisler, supra,* the New Jersey Supreme Court described the balancing of public policy considerations as a balancing test between the "warring interest of free speech and individual reputation." 104 N.J. at 265.

In *Turf*, giving due consideration to the interests of the public in speech which addresses matters involving consumer fraud, New Jersey struck the balance by requiring an actual malice standard. This striking of the balance can not be considered arbitrary or capricious and, as such, does not offend equal protection principles any more than common law absolute or qualified privileges in the law of defamation offend equal

protection principles. Such common law privileges founded, as they are, upon the recognition ". . . that on certain occasions the good that may be accomplished by permitting an individual to make a defamatory statement without fear of liability for misinformation outweighs the harm that may be done to the reputations of others", Robert D. Sack, *Libel, Slander, and Related Problems,* at 443-444, offend no equal protection principles.

II.

THE USE OF THE PHRASE "ACTUAL MALICE" BY THE NEW JERSEY SUPREME COURT, EVEN IF INCONSISTENT WITH THIS COURT'S DEFINITION OF THAT TERM, OFFENDS NO FEDERAL LAWS OR RIGHTS.

Petitioners engage in an analysis of the record to support its assertion that the New Jersey Supreme Court's conclusion that the reporter's "methods may have been negligent or even grossly negligent", *Turf*, Pet. App. B, 43a, but that Plaintiffs have failed to prove that Locklin ever doubted that Turf's conduct constituted serious consumer fraud practices and therefore failed to demonstrate actual malice is "in direct conflict with prior opinions of this court." (Pet. for Cert. at 21).

The simple answer to this assertion is that the standard of fault by which New Jersey measures actual malice is a state common law standard of fault. While the New Jersey Supreme Court resorted to opinions of this Court and other courts defining the concept of actual malice to inform its use of that term in New Jersey common law, those decisions do only that in New Jersey common law — provide an analytical background to draw upon in developing a meaning for the term actual malice. Indeed, in *Dairy Stores, supra*, the New Jersey Supreme Court commented

on the meaning of the term actual malice in New Jersey common law stating:

> The term "malice" caused enough confusion when it was confined to the common law, but now that it has assumed a constitutional dimension, the confusion is compounded. Understandably, the differing definitions of "malice" have confounded trial courts. *See, e.g., Burke v. Deiner, supra,* 97 N.J. at 479 (trial court erred by including both definitions of malice in jury instructions); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra,* 472 U.S. at 754, 105 *S.Ct.* at 2943 n. 3, 86 *L.Ed.*2d at 597 n. 3 (quoting from the trial court's charge that confused the two definitions of malice).
>
> "Malice" adds nothing to the legal analysis of an allegedly defamatory statement, and it can become a pitfall in the underbrush of the common law. Consequently, we lose nothing by striking "malice" from the vocabulary of the common law of defamation. Prosser & Keeton, *supra,* § 115 at 834. Indeed, the Restatement eschews the term altogether, speaking instead of the "abuse of privilege." *Restatement (Second), supra,* § 599. It is more direct to recognize the legal consequences of the publication of certain statements without recourse to so ambiguous a word with a checkered past. For example, we need not resort to the term "malice" to state that no one has a license to lie. Although we discard the label, we adhere to the

> principle that to overcome a qualified or conditional privilege, a plaintiff must establish that the publisher knew the statement to be false or acted in reckless disregard of its truth or falsity. *Restatement (Second), supra,* § 600. With or without the term, the critical determination is whether, on balance, the public interest in obtaining information outweighs the individual's right to protect his or her reputation. *Coleman v. Newark Morning Ledger Co., supra,* 29 N.J. at 376.

Consequently, because the New Jersey Supreme Court in *Turf* applied its own state fault standard, its application of that standard to the facts of this case does not result in a conflict as asserted by Petitionerswith prior decisions of this Court defining actual malice thereby warranting the exercise of this Court's supervisory authority.

III.

THE NEW JERSEY SUPREME COURT PROPERLY DECIDED BOTH JOHN GLORIA AND HIS CLOSELY HELD CORPORATION WERE REQUIRED TO PROVE ACTUAL MALICE.

Petitioners assert that the New Jersey Supreme Court's failure to distinguish Mr. Gloria from the corporate entity violated Mr. Gloria's right to the equal protection of New Jersey defamation law. Once again this assertion is unfounded. Simply stated, the facts in this case amply support the fact that in this close corporation that the corporation was the alter ego for Mr. Gloria. He was its spokesperson. Consequently, there was a sufficient basis in the record to support the Supreme Court's treatment of both Gloria and the corporation in the same manner.

CONCLUSION

Based upon the foregoing, *amicus curiae*, New Jersey Press Association, respectfully submits that the decision of the New Jersey Supreme Court was not in conflict with any other decision, and that there exists no important question of federal law which has not been, but should be, settled by this Court. *Amicus curiae* respectfully requests this Court deny the petition for certiorari.

Respectfully submitted,

THOMAS J. CAFFERTY
Counsel of Record
McGIMPSEY & CAFFERTY,
Attorneys for Amicus Curiae
New Jersey Press Association
285 Davidson Avenue
Somerset, New Jersey 08873
(908) 560-1900

Dated: October 10, 1995

Supreme Court, U.S.
FILED
OCT 27 1995
CLERK

(3)

No. 95-424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TURF LAWNMOWER REPAIR, INC. and
JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN,
MARY ANNE DEMARCO, DAVID HALL
and BYRON CAMPBELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

PETITIONERS' OPPOSITION TO THE MOTION OF THE NEW JERSEY PRESS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

THOMAS F. CAMPION
Counsel of Record
RICHARD E. BRENNAN
SHANLEY & FISHER, P.C.
Attorneys for Petitioners
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000

QUESTIONS PRESENTED

Petitioners Turf Lawnmower Repair, Inc. and John L. Gloria rely on their previous statement of the Questions Presented.

LIST OF PARTIES

Petitioners Turf Lawnmower Repair, Inc. and John L. Gloria rely on their previous statement of the List of Parties.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	v
STATEMENT OF THE CASE	2
OPPOSITION TO THE MOTION OF THE NEW JERSEY PRESS ASSOCIATION TO FILE BRIEF *AMICUS CURIAE*	2
I	
THE DECISION OF THE NEW JERSEY SUPREME COURT PERMITTING MEDIA DEFENDANTS, BY THEIR CONDUCT AND ACCUSATIONS, THE RIGHT TO CREATE THEIR DEFENSE TO A DEFAMATION SUIT VIOLATES PREVIOUS DECISIONS OF THIS COURT	2
II	
THE NEW JERSEY SUPREME COURT CITED AND MISAPPLIED PRECEDENT OF THIS COURT DEFINING THE ACTUAL MALICE STANDARD	3
III	
THE NEW JERSEY SUPREME COURT'S FAILURE TO DISTINGUISH MR. GLORIA'S CLAIM FOR DEFAMATION FROM THAT OF THE CORPORATE PETITIONER VIOLATED HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW	4
CONCLUSION	6

TABLE OF CITATIONS

	Page
Cases Cited:	
Hutchinson v. Proxmire, 443 U.S. 111 (1979)	2, 3
Kassell v. Gannett Co., Inc., 875 F.2d 935 (1st Cir. 1989).....	2
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	4
Wolston v. Readers Digest Ass'n, Inc., 443 U.S. 157 (1979)	2, 3

No. 95-424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TURF LAWNMOWER REPAIR, INC. and
JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN,
MARY ANNE DEMARCO, DAVID HALL
and BYRON CAMPBELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

PETITIONERS' OPPOSITION TO THE MOTION OF THE NEW JERSEY PRESS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Petitioners Turf Lawnmower Repair, Inc. ("Turf") and John L. Gloria ("Mr. Gloria"), the plaintiffs below, file this brief in opposition to the motion of the New Jersey Press Association ("NJPA") to appear as *amicus curiae* herein. Petitioners oppose the NJPA's motion because it seeks to appear not as a friend of this Court but as an additional advocate on behalf of Defendants/Respondents. For the reasons expressed below,

Petitioners respectfully request that this Court deny the NJPA's motion.

OPPOSITION TO THE MOTION OF THE NEW JERSEY PRESS ASSOCIATION TO FILE BRIEF *AMICUS CURIAE*

I

THE DECISION OF THE NEW JERSEY SUPREME COURT PERMITTING MEDIA DEFENDANTS, BY THEIR CONDUCT AND ACCUSATIONS, THE RIGHT TO CREATE THEIR DEFENSE TO A DEFAMATION SUIT VIOLATES PREVIOUS DECISIONS OF THIS COURT

In arguing that the New Jersey Supreme Court, by its decision below, merely furthered the development of New Jersey's common law, the NJPA ignores the significance of Petitioners' first reason for granting a writ of certiorari. Petitioners argued that the decision below arbitrarily grants media defendants control over the degree of protection that will attach to their speech by permitting them to create their own defense, contrary to previous decisions of this Court recognizing that "[c]learly those charged with defamation cannot, by their conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *see Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167-68 (1979). Applying *Hutchinson* and *Wolston*, the First Circuit wrote that permitting media defendants the right to create their defense and trigger the application of the heightened proof standards is "bootstrapping of the most flagrant sort." *Kassell v. Gannett Co., Inc.*, 875 F.2d 935, 941 (1st Cir. 1989).

In fact, the NJPA's brief is significant only for what it does not say. The NJPA does not and cannot dispute that the effect of the New Jersey Supreme Court's decision is to permit the media to create their own defense. It does not contest that the Petitioners herein were compelled to meet the "actual malice"

standard not because of anything they actually did, but because of the conduct and accusations of the defendants. It ignores the license granted by the New Jersey Supreme Court to the media to create their own defense by its holding that the actual malice standard applies if, examining the article in its entirety and assuming all allegations are true, Respondents have accused Petitioners of unfair consumer practices. (33a). The NJPA simply argues, without any discussion of *Hutchinson* or *Wolston*, that this bootstrapping in an acceptable development of state common law, even though it arbitrarily and capriciously authorizes a distinction in the treatment of defamation plaintiffs solely based on the conduct of the media defendants. Petitioners request this Court to grant the writ and reaffirm the principle announced in *Hutchinson* that defendants "[c]learly ... cannot, by their conduct, create their own defense ...." *Hutchinson*, 443 U.S. at 135.

II

THE NEW JERSEY SUPREME COURT CITED AND MISAPPLIED PRECEDENT OF THIS COURT DEFINING THE ACTUAL MALICE STANDARD

The NJPA does not contest that Petitioners have enough evidence to satisfy the standards previously announced by this Court defining actual malice. Rather, it argues that the New Jersey Supreme Court did not rely on this Court's precedent concerning actual malice, but merely imposed a "state common law standard of fault." (NJPAb12). That the New Jersey Supreme Court relied on federal constitutional law as established by this Court is beyond dispute. Justice Stewart Pollock wrote in his concurring opinion that "I would be less than faithful if I did not express regret about the majority's excessive reliance on federal cases and on the concept of 'actual malice.' If only the Court would look to its own decisions it could solve the present problem *without resort to constitutional principles*." (49a) (emphasis supplied). Justice Pollock's observation is fully supported by the majority's

opinion, in which it, citing *New York Times Co. v. Sullivan*, 376 U.S.254 (1964), wrote that, "To survive a motion for summary judgment, the plaintiffs must establish by clear and convincing evidence that the defendants published the article either with the knowledge that the statements were false or with reckless disregard of whether they were false." (41a). Further, the New Jersey Supreme Court observed that its function in this matter called upon it to balance the "often-conflicting goals of the First Amendment" -- a person's right to reputation against First Amendment expression. (43-44a).

The NJPA makes no effort to contest the quality and quantity of Petitioner's evidence of actual malice. An uncontested sampling of Respondents' fabrication and alteration of facts and quotations, their omission of relevant fact, and their dereliction of professional standards is set forth on pages 16 through 20 of the Petition. Petitioners refer the Court to those uncontested facts, probative on the issue of defendants' knowledge of falsity and reckless disregard of the truth.

III

THE NEW JERSEY SUPREME COURT'S FAILURE TO DISTINGUISH MR. GLORIA'S CLAIM FOR DEFAMATION FROM THAT OF THE CORPORATE PETITIONER VIOLATED HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW

The NJPA again does not challenge the underpinning of Mr. Gloria's argument that the New Jersey Supreme Court violated his rights to due process and equal protection of law by failing to distinguish Mr. Gloria, personally, from the corporate plaintiff. In the Petition, Mr. Gloria noted that the Respondents had not accused him, personally, of any conduct violative of the New Jersey Consumer Fraud Act. Merely because Mr. Gloria owned Turf, Respondents filled their report with invective, demonstrably not in the public interest, that Mr. Gloria was petty, vindictive, dishonest, and unethical. The NJPA offers no explanation of how the so-called public interest angle of the article -- the unmasking of Turf to the

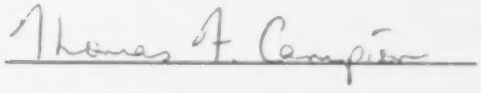
consuming public -- was advanced by this biting, sensational and ultimately false attack on Mr. Gloria. All the consuming public needed to know, in order to be informed, was that, in the Respondents' opinion, Turf's services were deficient.

It is remarkable that the media comes before this Court and requests a license not only to destroy the reputation of a small business, but the right to bootstrap the owner of the business to the report and then to level a gratuitous personal attack on him that advances *no* alleged public interest. The NJPA is speechless to explain why the public needed to know anything about Mr. Gloria's personal life or attributes. Its silence is telling: the public had no need to know. Respondents, like other media, grasped for the sensational to make their story more exciting and to sell more papers. In this instance, the First Amendment should afford no protection of the "actual malice" standard as, with respect to Mr. Gloria, his personal right to reputation obviously outweighed Respondents' alleged right to crass sensationalism and commercial sales.

CONCLUSION

For all the foregoing reasons Petitioners respectfully request the Court to issue a writ of certiorari to review and reverse the decision of the New Jersey Supreme Court, and to deny the motion of the New Jersey Press Association to file a brief *amicus curiae*.

DATED: Morristown, New Jersey.
October 27, 1995.



THOMAS F. CAMPION
RICHARD E. BRENNAN
Counsel of Record for Petitioners
SHANLEY & FISHER, P.C.
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000

(4)

No. 95-424

Supreme Court, U.S.
FILED
NOV 28 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC. and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DEMARCO, DAVID HALL and BYRON CAMPBELL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

PETER G. BANTA
Counsel of Record
DONALD A. KLEIN
CRAIG L. LEVINSON
WINNE, BANTA, RIZZI,
HETHERINGTON & BASRALIAN, P.C.
Attorneys for Respondents
25 Main Street
Hackensack, New Jersey 07601
(201) 487-3800

7346
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

53 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should exercise jurisdiction over claims, alleged to arise under the laws or Constitution of the United States, which were not raised in the courts below.

2. Whether the incremental extension of a defamation liability standard by the New Jersey Supreme Court to plaintiffs engaged in violations of the New Jersey Consumer Fraud Act violates the plaintiffs' right to equal protection under the Fourteenth Amendment to the United States Constitution.

3. Whether the similar treatment by the New Jersey Supreme Court of an individual and the business which he owned and operated violates the individual's right to equal protection under the Fourteenth Amendment to the United States Constitution.

4. Whether the adoption of a common law standard of defamation by a state court raises a federal question because the standard is similar to a standard made applicable to public official and public figure defamation by the First and Fourteenth Amendments to the Constitution of the United States.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The parent company of respondent Bergen Record Corporation is Macromedia, Incorporated, a New Jersey corporation. Macromedia, Incorporated has no subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

LIST OF PARENT COMPANIES AND SUBSIDIARIES ii

TABLE OF AUTHORITIES vii

JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THIS COURT LACKS JURISDICTION OVER THE JUDGMENT OF THE NEW JERSEY SUPREME COURT 3

A. The "federal" issues set forth in the Petition for Certiorari were not raised below -- a failure that is fatal to petitioners' position. . . . 3

B. In any event, the issues raised in the Petition are fundamentally state common law, not federal law, issues. 6

II. THE RELIANCE OF THE NEW JERSEY COURTS ON AN "ACTUAL MALICE" STANDARD TO DETERMINE THE BURDEN A PLAINTIFF MUST MEET AS TO A PUBLICATION ON A MATTER OF PUBLIC CONCERN DOES NOT CREATE AN ISSUE OF FEDERAL LAW 6

A. Reputation is not a federal constitutionally protected right. 6

B. The New Jersey Supreme Court applied an actual malice standard in this case as a matter of state common law, not federal constitutional law. 8

C. The New Jersey Supreme Court's definition of state common law privilege does not implicate equal protection rights. 13

III. THE NEW JERSEY SUPREME COURT'S APPLICATION OF THE PUBLIC CONCERN ACTUAL MALICE TEST TO BOTH TURF LAWNMOWER REPAIR AND JOHN GLORIA CREATES NO VIOLATION OF DUE PROCESS OR EQUAL PROTECTION 16

A. Petitioners Turf and Gloria treated themselves interchangeably in their filings in the New Jersey courts. 16

B. Plaintiffs did not raise a distinction between Turf and Gloria until their motion for reconsideration of the New Jersey Supreme Court's decision and, when they did, they made no due process or equal protection argument. 18

C. The treatment of Turf and Gloria by the same actual malice standard is legally correct. 19

IV. THERE IS NO BASIS FOR THE UNITED STATES SUPREME COURT TO REVIEW THE DECISIONS OF THE THREE COURTS BELOW THAT PETITIONERS HAD NOT SHOWN EVIDENCE OF ACTUAL MALICE SUFFICIENT TO WARRANT A TRIAL 20

A. Since the standard of actual malice was adopted by the New Jersey courts as a common law fault standard for publication on matters of public concern, the United States Supreme Court lacks jurisdiction to review its application. 20

B. This Court lacks supervisory authority over the state courts of New Jersey. 21

C. Review of factual determinations by the New Jersey courts in this case is an inappropriate use of the Court's scarce time and resources. . 22

CONCLUSION 25

APPENDIX

EXCERPTS FROM FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL 1a

EXCERPTS FROM BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, AND MARY ANNE DE MARCO DATED MARCH 9, 1993 FILED WITH APPELLATE DIVISION 4a

EXCERPTS FROM BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, AND MARY ANNE DE MARCO IN OPPOSITION TO CERTIFICATION DATED FEBRUARY 16, 1994 FILED WITH NEW JERSEY SUPREME COURT 10a

LETTER OF SHANLEY & FISHER, P.C. DATED NOVEMBER 21, 1994 TO STEPHEN W. TOWNSEND, CLERK OF THE NEW JERSEY SUPREME COURT 13a

LETTER OF WINNE, BANTA, RIZZI, HETHERINGTON & BASRALIAN, P.C. DATED NOVEMBER 21, 1994 TO NEW JERSEY SUPREME COURT 15a

EXCERPTS FROM PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION DATED MARCH 27, 1995 FILED WITH NEW JERSEY SUPREME COURT 17a

TABLE OF AUTHORITIES

Cases Cited:

Abella v. Barringer Resources, Inc.,
260 N.J. Super. 92, 615
A.2d 288 (Ch. Div. 1992) 21

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 11

Bainhauer v. Manoukian, 215 N.J. Super. 9,
520 A.2d 1154 (App. Div. 1987) 21

Bankers Life & Casualty Co. v. Crenshaw,
486 U.S. 71 (1988) 5

Binkewitz v. Allstate Ins. Co.,
222 N.J. Super. 501, 537 A.2d 723
(App. Div. 1988) 21

*Bose Corp. v. Consumers Union of United
States, Inc.*, 466 U.S. 485 (1984) 24

*Brill v. The Guardian Life Insurance
Company*, ___ N.J. ___, ___
A.2d ___, 1995 N.J. LEXIS 1040
(No. A-123-94, October 24, 1995) 12

Burke v. Deiner, 97 N.J. 465,
479 A.2d 393 (1984) 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 11

Curtis Publishing Co. v. Butts,
388 U.S. 130 (1967) 8

Dairy Stores, Inc. v. Sentinel Publishing Co.,
104 N.J. 125, 516 A.2d 220
(1986) 8, 10, 12, 16, 19, 21

Erickson v. Marsh & McLennan Co., Inc.,
117 N.J. 539, 569 A.2d 793 (1990) 21

Fees v. Trow, 105 N.J. 330,
521 A.2d 824 (1987) 21

Gallo v. Princeton University,
281 N.J. Super. 134, 656 A.2d
1267 (App. Div.), *certif. den.*
142 N.J. 453, 142 A.2d 453 (1995) 21

Gertz v. Robert Welch, Inc., 418 U.S.
323 (1974) 7, 8, 15, 16

Geyer v. Faiella, 279 N.J. Super. 386,
652 A.2d 1245 (App. Div. 1995) 21

Harte-Hanks Communications, Inc. v. Connaughton,
491 U.S. 657 (1989) 24

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 14

*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio
Corp.*, 475 U.S. 574 (1986) 11

McNabb v. United States, 318 U.S. 332 (1943) 22

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 8

Paul v. Davis, 424 U.S. 693 (1976) 7

Philadelphia Newspapers, Inc. v. Hepps,
475 U.S. 767 (1986) 8

Schiavone Construction Co. v. Time, Inc.,
619 F.Supp. 684 (D.N.J. 1985) 19

Schiavone Construction Co. v. Time, Inc.,
847 F.2d 1069 (3d Cir. 1988) 19

Schwartz v. Worrall Publications, Inc.,
258 N.J. Super. 493, 610 A.2d
425 (App. Div. 1992) 11

Siegert v. Gilley, 500 U.S. 226 (1991) 7

Sisler v. Gannett Co., Inc., 104 N.J. 256,
516 A.2d 1083 (1986) 8, 10, 12, 16, 19, 21

Time, Inc. v. Pape, 401 U.S. 279 (1971) 24

Williams v. Bell Tel. Lab., Inc.,
132 N.J. 109, 623 A.2d 234 (1993) 21

Wolston v. Reader's Digest Ass'n, Inc.,
443 U.S. 157 (1979) 14

Statutes and Rules Cited:

28 U.S.C. §1257(a) 1, 6

N.J.S.A. 56:8-1 *et seq.* 2

Supreme Court Rule 14.1(h) 3

United States Constitution Cited:

First Amendment 8, 24

Fourteenth Amendment 7, 8, 16, 24

Other Authorities Cited:

Hill, The Bill of Rights and the Supervisory Power, 69 Col. L. Rev. 181 (1969) 22

Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656 (1963) 22

Restatement (Second) of Torts 21

No. 95-424

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC. and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DEMARCO, DAVID HALL and BYRON CAMPBELL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Bergen Record Corporation, Bruce Locklin, Mary Anne DeMarco, David Hall and Byron Campbell respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the New Jersey Supreme Court's opinion in this case. That opinion is reported at 139 N.J. 392, 655 A.2d 417 (1995).

JURISDICTION

Respondents dispute the existence of jurisdiction of this Court to review the judgment of the New Jersey Supreme Court under 28 U.S.C. §1257(a) for the following reasons: (a) no federal question arising under a federal statute or provision of the United States Constitution and amendments thereto is involved; and (b) any alleged federal questions asserted by petitioners were not timely or properly raised in the courts below.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case misstates both the proceedings and the holdings of the courts below. It also distorts the evidence in the record.[1]

For example, the Petition states that the holding of the New Jersey Supreme Court -- that the common law public concern privilege should apply to consumer fraud reports -- was "even uninvited by the briefs submitted by the defendants" (Pet.3). That is simply not true. The two lower courts had found that doing business with the consuming public was sufficient to invoke the actual malice standard (Pet.57a, 69a). The decision of the New Jersey Supreme Court substantially narrowed the prior holdings, by holding that while merely doing business with the public would not be sufficient, engaging in acts violative of the Consumer Fraud act would be. While defendants believed that the broader rulings below were proper (and two concurring New Jersey Supreme Court Justices agreed), the public policy of the Consumer Fraud Act was brought to the attention of the

---

[1]The attention of this Court is directed to the description of the litigation set forth in the opinion of the New Jersey Supreme Court (Pet.App.B).

appellate courts (and to petitioners) in both defendants' Appellate Division brief (App. 7-8), and in defendants' Brief in Opposition to Certiorari filed with the New Jersey Supreme Court (defendants noting in the latter that "[l]egislation like the New Jersey Consumer Fraud Act N.J.S.A. 56:8-1 *et seq.*) underscores the legitimate public interest in protecting consumers who purchase products or services").

At oral argument in the New Jersey Supreme Court, plaintiffs' counsel made no claim of surprise when violations of the Consumer Fraud Act were raised as a basis for applicability of the actual malice standard. Rather, he vigorously argued the merits of the issue to the Court.

Petitioner's argument that "defendants' allegations of consumer fraud engendered a public controversy" (Pet.3-4) -- critical to their claim that "defendants were permitted to create their own defense" (Pet.4) -- misrepresents the New Jersey Supreme Court decision. Contrary to petitioners' assertions, the New Jersey Supreme Court did not reason that rather than "the activity of plaintiffs," it was "the reporting activity of the defendants themselves" that required plaintiffs to satisfy the federal actual malice standard (Pet.7). In fact, the Court held the direct opposite -- in applying a common law actual malice standard. *See* discussion *infra*, Point II.

Although petitioners later modified their misstatement (Pet.5), the New Jersey Supreme Court never said, as petitioners claim in their introductory sentence, that they "suffered grave wrong and the loss of their livelihood" as a result of "the gross negligence" of defendants (Pet.3). In fact, the comments cited by petitioners were made by the New Jersey Supreme Court in the context of its unequivocal determination that defendants never doubted the truth of the subject article (Pet.43a).

Nowhere in their Statement of the Case do petitioners acknowledge that this is a common law privilege case, not a public official or public figure case. The New Jersey Supreme Court's reference to federal cases (Pet.5) was by way of analogy, not controlling precedent. A state court's application of an actual malice standard in such context, whether consistent or not with federal decisions, raises no federal question.

In any event, petitioner's effort to raise "federal" issues (Pet.5-6) is predicated on misrepresentations of, and half-truths about, the record in this case. Petitioners' claimed evidence of actual malice (Pet.6, 19-20) is a rehash of arguments made to, and rejected by, three courts below. The distortions in petitioners' description of the "evidence" were set forth in respondents' briefs below (for a sample, see App. 5-7, 8-9, 11-12) -- and were rejected by each of the courts below. None of the deficiencies alleged went to the issue of subjective knowledge of falsity or reckless disregard for the truth -- that is at the heart of the actual malice standard.

REASONS FOR DENYING THE WRIT

I

THIS COURT LACKS JURISDICTION OVER THE JUDGMENT OF THE NEW JERSEY SUPREME COURT.

A. The "federal" issues set forth in the Petition for Certiorari were not raised below -- a failure that is fatal to petitioners' position.

Rule 14.1(h) of the Supreme Court Rules (as in effect when the Petition was filed) states:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in paragraph .1(k) of this Rule.

Petitioners' Statement of the Case contains no specification of when or how the "federal" issues now asserted were raised below. In fact, no argument based on denial of equal protection was ever made to any New Jersey state court. On the contrary, to the extent arguments generally similar to those in the Petition were made to the New Jersey courts, no reference was made by plaintiffs to any federally created right protecting plaintiffs or to any federally based standard governing the rights of the parties. See, e.g., the discussion *infra*, Point III (no federal constitutional issue was raised below as to the application of the actual malice test to both Turf Lawnmower Repair and John Gloria).

The United States Supreme Court has made clear in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) that failure to specifically raise federal issues in the state courts forecloses Supreme Court review:

> Appellant maintains that it raised its various challenges to the size of the punitive damages award in its petition for rehearing before the Mississippi Supreme Court. * * * But appellant's petition for rehearing alleged only that the punitive damages award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." App. to Juris. Statement 139a. The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claim. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon. Cf. Taylor v. Illinois, 484 U.S. 400, 407 n9 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights ...").
>
> * * * As this Court stated in Webb v. Webb, 451 U.S. 493, 501 (1981), "[a]t the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law."

486 U.S. at 77-78.

Obviously, the assertion by petitioners of equal protection violations is an afterthought, designed solely to confer jurisdiction on this Court to review the adverse decision below. However, the history of this Court's practice and precedent is that jurisdiction will not be found under 28 U.S.C. §1257(a) unless the alleged federal issues were asserted and addressed below.

B. In any event, the issues raised in the Petition are fundamentally state common law, not federal law, issues.

See discussion *infra*, Points II to IV. Petitioners' attempt to belatedly recharacterize, in federal terms, the New Jersey Supreme Court's application of state law is unavailing.

II

THE RELIANCE OF THE NEW JERSEY COURTS ON AN "ACTUAL MALICE" STANDARD TO DETERMINE THE BURDEN A PLAINTIFF MUST MEET AS TO A PUBLICATION ON A MATTER OF PUBLIC CONCERN DOES NOT CREATE AN ISSUE OF FEDERAL LAW.

A. Reputation is not a federal constitutionally protected right.

Petitioners' first argument point is premised on their "constitutionally protected right in their good name and reputation and their rights to equal protection of the law" (Pet.8). However, there is no such federal constitutionally protected right; the only federal mandates are constitutional limits on state-created causes of action for defamation.

This Court has explicitly recognized that there is no federally created right to be free from defamation. *See Siegert v. Gilley*, 500 U.S. 226, 233 (1991):

> Defamation, by itself, is a tort actionable under the laws of most states, but not a constitutional deprivation.

See also Paul v. Davis, 424 U.S. 693 (1976) (rejecting a claim that defamation by a state officer deprived a plaintiff of rights secured to him by the Fourteenth Amendment to the United States Constitution). Contrary to petitioners' argument (Pet. 8-9), the United States Supreme Court did not recognize a constitutional right to protection of one's good name and reputation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); rather, the Court there specifically acknowledged the state law basis for libel:

> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.
>
> * * *
>
> [W]e conclude that the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.

418 U.S. at 341, 345-46.

B. The New Jersey Supreme Court applied an actual malice standard in this case as a matter of state common law, not federal constitutional law.

Until *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) defamation was regarded as a common law tort, without constitutional significance. That case and its progeny recognized *limitations* on a plaintiff's right to relief, based on First Amendment and Fourteenth Amendment considerations.[2]

In *Gertz* the United States Supreme Court limited federal constitutional protection to statements about "public officers" and "public figures." However, as the New Jersey Supreme Court noted in its opinion below (Pet.53a-54a), *Gertz* left open to the states the definition of appropriate standards of liability in other types of cases. Nine years ago, the Supreme Court of New Jersey, as a matter of state common law, applied the actual malice standard to comment on a regulated product affecting health (*Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 516 A.2d 220 (1986)) and on activities of an individual in a highly regulated industry (*Sisler v. Gannett Co., Inc.*, 104 N.J. 256, 516 A.2d 1083 (1986)).

In *Dairy Stores* the New Jersey Supreme Court rejected rulings of its lower courts that defendant was a public figure under federal constitutional guidelines, noting:

> Although constitutional considerations have dominated defamation law in recent years, the common law provides an

---

[2]These are, briefly, the actual malice fault standard as applied to actions by public officials (*New York Times v. Sullivan*) and by public figures (*Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)); the prohibition in all other cases of the imposition of liability without fault and restrictions on presumed damages and punitive damages in public concern cases absent a showing of actual malice (*Gertz*); the requirement that plaintiffs prove falsity in actual malice and public concern cases (*Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

> alternative, and potentially more stable, framework for analyzing statements about matters of public interest.
>
> Another reason for turning to the common law is that the constitutional concepts do not comfortably fit the activities or products of a corporation.

104 N.J. at 139, 516 A.2d at 227. Concluding that New Jersey's common law privilege of fair comment should be extended to a newspaper article critical of a store selling possibly adulterated bottled water, New Jersey's highest court applied an actual malice standard to determine if the privilege was overcome. While analogizing to the federal standard, the New Jersey Supreme Court adopted an actual malice standard as a matter of state common, not federal constitutional, law:

> The fair comment defense, the purpose of which is to foster the discussion of matters of legitimate public concern, is closely related to the constitutional protection accorded to statements about public officials and public figures. Although the adoption of the actual malice test is not constitutionally compelled, *Restatement (Second)*, *supra*, §580B comment c; 2 Harper, James & Gray, *supra*, §5.27 at 233-34, we conclude that the defense of fair comment, like the constitutional protection, should be overcome only by proof of actual malice. *See Burke v. Deiner*, 97 N.J. 465, 476-77 (1984).

104 N.J. 150-51, 516 A.2d at 233.

Similarly, in *Sisler* the New Jersey Supreme Court grounded its application of an actual malice standard in common law, not federal constitutional, principles:

> In contradistinction from the federal view, we do not deem it unfair to favor free speech over the reputational interests of an individual who has voluntarily and knowingly engaged in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny.
>
> * * *
>
> We conclude that in such a case the interests of free speech justify, and fairness to individual reputation permits, application of a strict and high burden of proof to establish actionable defamation. This is encompassed by a standard akin to the "actual malice" standard of *New York Times v. Sullivan.*

104 N.J. at 274-75, 516 A.2d at 1092-93.

Precisely because application of an actual malice test in cases of public concern was a common law adoption, the New Jersey courts have consistently applied the state, not the federal, summary judgment test in such cases. In *Dairy Stores*, for example, the New Jersey Supreme Court declared itself not bound by the federal summary judgment rule, stating:

> Under federal law, *Liberty Lobby* would compel granting defendants' motion for summary judgment. As previously indicated, however, our decision is predicated on actual

> malice as a common-law concept. So viewed, our duty is to review the propriety of the summary judgment as a matter of state law.

104 N.J. at 156, 516 A.2d at 236. *See also Schwartz v. Worrall Publications, Inc.*, 258 N.J. Super. 493, 501, 610 A.2d 425, 429 (App. Div. 1992):

> [W]here actual malice is implicated as a common-law concept in the application of common-law privileges, the traditional test for summary judgment applies because the evidentiary burden at trial is not controlled by *New York Times*.

Further, as the New Jersey Supreme Court noted this past year in adopting, as a matter of state law, new summary judgment standards based in part on the *Matsushita/Liberty Lobby/Celotex* trilogy of federal cases:[3]

> *Dairy Stores*, supra, 104 N.J. at 125, was decided only four months after *Liberty Lobby* and *Celotex*. We noted in *Dairy Stores*, *id.* at 155-56, that we were not bound to follow the rule announced in *Liberty Lobby*. We reasoned that *Dairy Stores* involved actual malice as a common-law bar to the defense of fair comment, while *Liberty Lobby* involved actual malice as a constitutionally mandated component of a defamation action brought by a public official or public person. *Ibid.*

---

[3] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Brill v. The Guardian Life Insurance Company, ___ N.J. ___, __A.2d ___, 1995 N.J. LEXIS 1040, *29 (No. A-123-94, October 24, 1995).

The progeny of *Dairy Stores* and *Sisler*, the New Jersey Supreme Court decision which is the subject of the Petition, while looking to corroborative federal law principles,[4] is firmly rooted in state common law:

> The law of New Jersey parallels the complex, yet ever changing law of defamation in both federal and other state courts.
>
> * * *
>
> In *Dairy Stores* and *Sisler*, we constructed a test to reflect public policy considerations often ignored in other states.

---

[4]Justice Pollock's reference to the majority's "excessive reliance on federal cases and their reliance on the concept of 'actual malice'" (Pet.16n.1) does not mean that the actual malice standard is federalized in this case. As his opinion for the Court in *Dairy Stores* made clear, Justice Pollock believed that the term "actual malice" was confusing and preferred a less ambiguous statement of the applicable standard:

> Although we discard the label, we adhere to the principle that to overcome a qualified or conditional privilege, a plaintiff must establish that the publisher knew the statement to be false or acted in reckless disregard of its truth or falsity. *Restatement (Second), supra, §600.* With or without the term, the critical determination is whether, on balance, the public interest in obtaining information outweighs the individual's right to protect his or her reputation. *Coleman v. Newark Morning Ledger Co., supra*, 29 N.J. at 376.

104 N.J. at 151, 516 A.2d. at 233.

* * *

> The public [has] a legitimate interest in any business charged with criminal fraud, a substantial regulatory violation, or consumer fraud that raises a matter of legitimate public concern. When the media addresses those issues of legitimate and compelling public concern, the actual-malice standard of proof will apply, regardless of the type of business involved. In so ruling, we seek a balance between a private person's right of privacy and the public's right to know of various dangers in our society.

(Pet.21a, 23a, 28a).

C. The New Jersey Supreme Court's definition of state common law privilege does not implicate equal protection rights.

Contrary to petitioners' argument, the New Jersey Supreme Court's adoption of an actual malice standard where a publication involves allegations of consumer fraud raises no federal question.

Petitioners claim that the New Jersey Supreme Court in this case looked to defendants' actions, rather than to the activities of plaintiffs (Pet.9-13). That is simply not true. *See* Pet.32a, 34a:

> What constitutes consumer fraud depends not on the manner of investigation employed by the media to capture the story, but generally on whether the alleged activities of the business would constitute a cause of action under the Consumer Fraud Act.

* * *

> In determining whether plaintiff has introduced sufficient evidence to show that the article fails to set forth acts of consumer fraud that raise matters of legitimate public concern, the reporter's conduct is irrelevant. Rather, we focus on Turf's actions.[5]

Untrue too is petitioners' claim that "[a]ll a media defendant needs to do is simply include in its report a single sentence that could be construed to implicate a consumer fraud statute and *ipso facto* the entire article will be protected by the actual malice standard" (Pet.9). As the New Jersey Supreme Court stated:

> [T]he article must deal primarily with consumer fraud viewed as a whole in light of all surrounding circumstances.

(Pet.32a). Petitioners further ignore the careful and detailed analysis made by the New Jersey Supreme Court of the subject article (Pet.34a-40a), which led to the Court's conclusion that "[b]ecause defendants' article described sufficient uncontradicted assertions of Turf's conduct that, if true, would be sufficient to support a complaint of consumer fraud under the Act, we find Locklin's article is well

---

[5]*Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), cited by petitioners, are public figure cases in which at issue was whether defendants could bootstrap plaintiffs' public figure status by relying on the effect of the subject publications. In this case, the common law privilege (applicable to consumer fraud reports) is defined by the Court based on plaintiffs' prepublication activities.

grounded in consumer fraud" (Pet.40a).[6] In short, petitioners' equal protection argument is based on fundamental distortions of the New Jersey Supreme Court's opinion.

Petitioner's "federal" issue argument also disregards the legal context of the New Jersey Supreme Court's ruling. This is neither a public official nor a public figure case. It is a common law privilege case -- clearly within the parameters set by *Gertz*, which allow states to contract the boundaries of defamation and create their own privileges. The New Jersey Supreme Court has ruled that reports on matters of public concern are entitled to a heightened fault standard and, in the subject case, has held -- in a ruling that substantially limits broader decisions by the trial and intermediary appellate courts[7] -- that consumer fraud reports are matters of public concern. That ruling raises no equal protection issue; the distinctions drawn by the New Jersey state courts in defining the scope of common law privilege are neither arbitrary nor capricious. Contrary to *Gertz*, petitioners' argument would vitiate the ability of states to

---

[6]Obviously, the New Jersey Supreme Court relied on the various, corroborative sources for the article, contrasting the situation where "if the sole source of an article is a disgruntled, fired employee, or a sole competitor, a court could conclude that that evidence alone would not be sufficient to support an action that a plaintiff's conduct violated the [Consumer Fraud] Act" (Pet.36a).

[7]Indeed, the New Jersey Supreme Court did precisely what petitioners (in opposing an amicus application) urged it to do:

> Instead of extending broad privileges to the media, this Court should continue to adhere to the majority trend of narrowly defining those instances where qualified privileges attach.

(Plaintiffs' August 17, 1994 Brief in Reply to the Brief of *Amicus Curiae* New Jersey Press Association, p.6).

define their respective defamation laws and could be applied with equal force to *Dairy Stores* and *Sisler*.

III

THE NEW JERSEY SUPREME COURT'S APPLICATION OF THE PUBLIC CONCERN ACTUAL MALICE TEST TO BOTH TURF LAWNMOWER REPAIR AND JOHN GLORIA CREATES NO VIOLATION OF DUE PROCESS OR EQUAL PROTECTION

A. Petitioners Turf and Gloria treated themselves interchangeably in their filings in the New Jersey courts.

Petitioners' argument that the New Jersey Supreme Court's treatment of John Gloria as indistinct from his corporation violates his rights under the Fourteenth Amendment to due process and equal protection is disingenuous. The article sued on recognized Gloria as the alter ego and moving force behind Turf, which Gloria has repeatedly acknowledged in his pleadings. Also, none of the allegations complained of by plaintiffs related to Gloria individually; they related only to his relationship with Turf.

In their Amended Complaint, plaintiffs made no distinction between Turf and Gloria after the introductory paragraphs, which described Turf as the operator of the lawnmower business (¶1) and Gloria as its president and sole owner for ten years prior to August 21, 1988 (¶2) (App. 1-3). Plaintiffs continued to equate Turf and Gloria in their briefs in opposition to summary judgment in the state courts, failing to distinguish between the two. Indeed, plaintiffs commenced the Preliminary Statement of their Appellate Division brief with the following sentence:

> For nearly ten years, John L. Gloria ("Gloria") operated his lawnmower repair business, Turf Lawnmower Repair, Inc. ("Turf"), in Teaneck, achieving an admirable record of growth and customer satisfaction.

(Plaintiffs' January 7, 1993 Appellate Division Brief, p.1). The New Jersey Supreme Court did not separately decide Gloria's status, as that was not raised to the Court prior to its decision in March 1995.

Petitioners also ignore the fact that the only allegedly defamatory statements identified in the Amended Complaint (¶21) related to the activities of Turf (including Gloria as owner) (App. 2-3). None related to Gloria individually -- e.g., "to the car he drove, to the value and location of his home, [or] to his family life" (Pet.13). *See, e.g.,* the Appellate Division opinion below:

> Although it is clear that Gloria is not a public figure or official and that he is, therefore, protected by a broader zone of privacy than a public figure or official would be, the contents of defendants' article had nothing to do with those of Gloria's interests which are properly encompassed within his zone of privacy.
>
> * * *
>
> Every comment complained of in the offending article dealt with Gloria's activities in the business of plaintiff Turf, which we hold to be of legitimate public interest; or with his activities in politics, which are *per se* matters of legitimate public interest.

(Pet.57a-58a). As evidenced by the timing of plaintiffs' first reference to a distinction between Turf and Gloria, petitioners' present argument is an after-the-fact, bootstrap attempt to resurrect a lost argument.

B. Plaintiffs did not raise a distinction between Turf and Gloria until their motion for reconsideration of the New Jersey Supreme Court's decision and, when they did, they made no due process or equal protection argument.

For the first time, in Point I(A) of their Brief in Support of Motion for Reconsideration, filed with the New Jersey Supreme Court after its March 1995 decision, petitioners argued for a distinction between Turf and Gloria as to application of the actual malice standard (App. 18). No cases were cited to support plaintiffs' conclusion that if the actual malice standard is applied to a business, it should not apply to the "private persons who own or operate the business" (App. 19). Most importantly, petitioners made no argument in the state courts that failure to distinguish Gloria from Turf would deny him due process or equal protection of the law under any law of the United States or under the United States Constitution, and no authorities were cited to such effect.

C. The treatment of Turf and Gloria by the same actual malice standard is legally correct.

The trial court ruled that plaintiffs had conceded applicability of the actual malice standard as to Turf and Gloria and did not rule separately as to them (Pa62). As noted, the Appellate Division dealt specifically with Gloria's status, holding that the actual malice standard applied to him as well as Turf as the statements complained of related to Gloria in his status as owner of Turf. The Supreme Court

agreed on this issue, plaintiffs making no argument to the contrary.

That ruling was clearly correct as a matter of state common law. In defining the scope of common law privilege, the New Jersey Supreme Court -- in *Dairy Stores* and *Sisler* and now in *Turf* -- has applied an actual malice standard to various private individuals or entities because of their relationship to the matter of public concern which invokes the privilege. Given Gloria's conceded alter ego status, such approach was manifestly appropriate in this case.[8]

IV

THERE IS NO BASIS FOR THE UNITED STATES SUPREME COURT TO REVIEW THE DECISIONS OF THE THREE COURTS BELOW THAT PETITIONERS HAD NOT SHOWN EVIDENCE OF ACTUAL MALICE SUFFICIENT TO WARRANT A TRIAL.

---

[8] *Cf. Schiavone Construction Co. v. Time, Inc.*, 619 F.Supp. 684 (D.N.J. 1985) (holding that since Schiavone Construction Co. was a public figure, Ronald A. Schiavone (its founder, president and major owner) was a public figure):

> Plaintiffs' status in this regard is identical one to the other. The court's holding, *supra*, at 26-29, that defamation of Schiavone Construction Co. may be "of and concerning" plaintiff Ronald Schiavone, simply because the two are inextricably intertwined by name and corporate structure, requires that if one is deemed a public figure so must the other be.

619 F.Supp. at 704 n. 13. *See also Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988).

A. Since the standard of actual malice was adopted by the New Jersey courts as a common law fault standard for publication on matters of public concern, the United States Supreme Court lacks jurisdiction to review its application.

The Petition ignores the fundamental fact that the New Jersey state courts adopted an actual malice standard as a matter of state, not federal, law. This is a common law privilege case. The decision appealed from is simply an incremental extension of a state public concern standard adopted by the New Jersey Supreme Court nearly a decade ago. See discussion *supra*, Point II.

Petitioners' argument, if accepted, would have the effect of federalizing all common law privilege cases in New Jersey. This is not insignificant, as actual malice has become the common law standard for abuse of all conditional privileges in New Jersey since the New Jersey Supreme Court's rejection of an ill will standard in *Burke v. Deiner*, 97 N.J. 465, 479 A.2d 393 (1984) and the common law standard for all public concern defamation cases since *Dairy Stores* and *Sisler* were decided by the New Jersey Supreme Court in 1986.[9]

---

[9]*See, e.g., Williams v. Bell Tel. Lab., Inc.*, 132 N.J. 109, 623 A.2d 234 (1993) (statements made to county prosecutor's office charging criminal violations); *Erickson v. Marsh & McLennan Co., Inc.*, 117 N.J. 539, 569 A.2d 793 (1990) (former employer's response to prospective employer of a discharged employee); *Fees v. Trow*, 105 N.J. 330, 521 A.2d 824 (1987) (report by an employee of abuse by another employee on a resident of a state facility for the developmentally disabled in any civil or criminal proceedings arising from the report); *Gallo v. Princeton University*, 281 N.J. Super. 134, 656 A.2d 1267 (App. Div.) (statements by university officials to university community concerning investigation into misconduct in university department), *certif. den.* 142 N.J. 453, 142 A.2d 453 (1995); *Geyer v. Faiella*, 279 N.J. Super. 386, 652 A.2d 1245 (App. Div. 1995) (statement to U.S. Attorney's office charging criminal

Moreover, since Section 600 of the *Restatement (Second) of Torts* has adopted an actual malice standard for abuse of conditional privilege, petitioners' argument, if accepted, would also have the effect of federalizing all common law privilege cases in states that adhere to the *Restatement*. That too is neither a desirable, nor appropriate, result.

B. This Court lacks supervisory authority over the state courts of New Jersey.

Petitioners ask the Court to review the record as to actual malice in "the exercise of this Court's supervisory authority" (Pet.16). However, petitioners' attempted invocation of the Court's "supervisory authority," which had its origins in *McNabb v. United States*, 318 U.S. 332, 340 (1943), is misplaced. Such "authority" has application only to proceedings of lower federal courts, not to review of a decision of a state's highest court. *See Hill, The Bill of Rights and the Supervisory Power,* 69 Col. L. Rev. 181, 181-82 (1969):

> The supervisory power has been broadly defined by the Supreme Court as encompassing a general authority over the administration of justice *in the inferior or federal courts; . . . . (emphasis added).*

---

violations); *Binkewitz v. Allstate Ins. Co.*, 222 N.J. Super. 501, 537 A.2d 723 (App. Div. 1988) (defamatory words uttered in the course of and with some relation to statutorily required loss appraisal proceedings); *Bainhauer v. Manoukian*, 215 N.J. Super. 9, 520 A.2d 1154 (App. Div. 1987) (statements by surgeon to hospital officials about another doctor's alleged incompetence if made to protect patients); *Abella v. Barringer Resources, Inc.*, 260 N.J. Super. 92, 615 A.2d 288 (Ch. Div. 1992) (financial reports prepared by independent auditors).

See also Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656 (1963).

C. Review of factual determinations by the New Jersey courts in this case is an inappropriate use of the Court's scarce time and resources.

Ten New Jersey state court judges, at three levels, have carefully reviewed the voluminous record in this case[10] and unanimously concluded that petitioners did not make a sufficient showing of actual malice to create a jury issue as to abuse of the applicable common law privilege. Common to each of the decisions below was the conclusion that rather than show knowledge of falsity or serious doubts as to the truth, the evidence clearly reflected defendants' firm belief in the truth of the article. Thus, for example, the New Jersey Supreme Court concluded:

> [W]e find that plaintiffs have failed to prove that Locklin ever doubted that Turf's conduct constituted serious consumer fraud practices. Plaintiffs, therefore, have failed to establish that Locklin demonstrated actual malice in his reporting.

---

[10]At the trial level, argument on the proofs of actual malice consumed 160 pages of transcript (Pet.62a). The New Jersey Supreme Court not only reviewed the numerous depositions and affidavits in this case (App. 13), it also reviewed the tape recording of the critical exchange between Locklin and Turf (App. 15-16), obviously rejecting petitioners' mischaracterization of the conversation and its import.

(Pet.43a). *See also* the Appellate Division majority opinion, which agreed with the trial court's detailed findings and conclusions (*see* Pet.74a-76a):[11]

> In order to succeed, plaintiffs must be prepared to show that defendants or any of them "entertained serious doubts about the truth" of the published material. * * * Nothing in the record before us creates a genuine issue of material fact when measured by the heightened proof standard in the light of the need for a "state of mind" showing.

(Pet. 59a) (citations omitted).[12]

The scarce time of nine justices of this Court could hardly be spent in a less productive manner than in second-guessing ten state court judges' unanimous rulings on whether sufficient evidence has been offered to create a jury issue as to a state-created privilege, merely because the test for the scope of the privilege has its intellectual antecedent in rulings on cases involving First and Fourteenth

---

[11]Among other things, the trial court noted that "the comments of each individual to Bruce Locklin were highly detailed and cumulatively very similar," "there were numerous informants," and Locklin "even confronted John Gloria who did not deny the allegations" (Pet.74a-75a).

[12]The concurring judge reached the same conclusion:

> I agree that on the record presented there is no reasonable prospect that the plaintiffs, having concluded discovery in this matter, will be able to establish that these defendants entertained serious doubts as to the truth of the publications, ...

(Pet.63a).

Amendment issues.[13] As Justice Harlan said in *Time, Inc. v. Pape*, 401 U.S. 279, 294 (1971):

> Indeed, it is almost impossible to conceive how this Court might continue to function effectively were we to resolve afresh the underlying factual disputes in all cases containing constitutional rights.

(Harlan, J. dissenting). *A fortiori*, no such undertaking should be made in this state common law case.

---

[13]This Court has only occasionally undertaken to weigh the factual submissions in defamation cases, and then only when the constitutional standard of public official/public figure was found to be present by the court below. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

PETER G. BANTA
Counsel of Record
DONALD A. KLEIN
CRAIG L. LEVINSOHN
WINNE, BANTA, RIZZI
HETHERINGTON &
BASRALIAN, P.C.
Attorneys for Respondents
25 Main Street
Hackensack, New Jersey 07601
(201) 487-3800

Dated: November 28, 1995

EXCERPTS FROM FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

JAFFE & SCHLESINGER, P.A.
8 Mountain Avenue
Springfield, NJ 07081
(201) 467-2246
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-BERGEN COUNTY
L-30435-89

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DE MARCO, DAVID HALL, BYRON CAMPBELL, EDWARD MITCHELL d/b/a Eddie's Power Equipment, MARK WINNERS, ROBERT VROEGINDAY, DOUGLAS LIVINGSTON, JOHN DOE and RICHARD ROE, INC.

Defendants.

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Turf Lawnmower Repair, Inc. ("Turf"), a corporation of the State of New Jersey with offices located at 746 New Bridge Road, Teaneck, New Jersey 07666 and John L. Gloria ("Gloria"), residing at 535 Reservoir Drive, Franklin Lakes, New Jersey 07417, complaining of the defendants, state as follows:

PARTIES:

1. Plaintiff Turf is a New Jersey corporation that, at the time of the activities of the defendants complained of, engaged in the business of the sale and repair of lawnmowers and other power equipment in Bergen County.

2. Plaintiff Gloria had been the president and sole owner of Turf for nearly ten years prior to August 21, 1988.

* * *

21. Libelous statements contained in the August 21, 1988 article, a true copy of which is attached as Exhibit "A" to this complaint, include, but are not limited to, the following:

(a) the sub-caption of the article states "Tests, ex-workers reveal Teaneck shop deceives, overcharges";

(b) the statement that "Most customers who paid for tune-ups [at Turf] got little more than an oil change and a new spark plug - for which they typically were overcharged $20 to $30";

(c) the statement that "Some [Turf customers] paid for new parts and got used parts from junked mowers";

(d) the statement that "Many [Turf customers] were charged for repair work that was never done";

(e) the statements that "Reporters brought in mowers in need of simple repairs. Each time, Turf recommended or performed unnecessary work";

(f) the statement that "There's a pervasive rudeness at Turf, where employees often add insult to injury";

(g) the statement, attributed to defendant Winners, that plaintiff Gloria "made bogus tune-ups standard procedure";

(h) the statement, attributed to defendants Winners and Vroeginday, that plaintiff "Gloria often lied to customers who brought in mowers that had jammed after hitting something solid";

(i) the statement, attributed to defendant Vroeginday, that "A job that should have cost $20 would cost about $90"; and

(j) the statement, attributed to defendant Livingston, that "Gloria sometimes got vindictive if a customer got impatient".

EXCERPTS FROM BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, AND MARY ANNE DE MARCO DATED MARCH 9, 1993 FILED WITH APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-159-92T3
ON APPEAL FROM A FINAL JUDGMENT OF
THE SUPERIOR COURT, LAW DIVISION
SAT BELOW HON. MARGUERITE T. SIMON

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs-Appellants,

v.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, MARY ANNE DE MARCO, and EDWARD MITCHELL d/b/a EDDIE'S POWER EQUIPMENT,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN AND MARY ANNE DE MARCO

WINNE, BANTA, RIZZI,
HETHERINGTON & BASRALIAN, P.C.
Court Plaza North
25 Main Street
P.O. Box 647
Hackensack, New Jersey 07602
(201) 487-3800
Attorneys for Defendants-Respondents Bergen Record Corporation, David Hall, Byron

Campbell, Bruce Locklin, and Mary Anne DeMarco

OF COUNSEL:
Peter G. Banta
ON THE BRIEF:
Donald A. Klein
Peter F. Weiss

(p4)

- Plaintiffs describe as logically inconsistent (Pb21) the suggestion that customers "ignored their [Turf] 'guarantees' and brought machines [that had been repaired by Turf] to other dealers." No mention is made of the fact that the Snapper distributor subpoenaed by plaintiffs testified that, notwithstanding Turf's "guarantee," other shops "would be complaining about customers coming in with repair jobs that they paid Turf Lawn Mower for" since "[m]ost of the customers would not go back to Turf" (Pa1657) -- or to the information provided to Locklin by other repair shops (see discussion infra).

* * *

- Plaintiffs argue (Pb49) that Locklin reported that John Gloria had made his first million with $500,000.00 to spare but made no mention of Gloria's real estate dealings. In fact, the subject article states that Gloria's quality controls had slipped "because he was heavily involved in other investments" (Pa38) - a fact acknowledged by Gloria in his interview with Locklin (Pa1481-84).

* * *

(pp29-31)

Prior to publication of the subject article, Locklin asked Gloria to provide a list of satisfied Turf customers; Gloria promised to do so but never did provide the list:

> Q. *** Do you [John Gloria] recall if you told Mr. Locklin that you would call him with references of people who had good experiences at Turf Lawnmower?
>
> A. Yes.
>
> * * *
>
> Q. Do you recall if, in fact, you called Mr. Locklin before the article was published with good references, by which I mean names of people who had favorable experiences with Turf.
>
> A. No, I did not call in any references.

(Pa1462-63)(emphasis added).***

The Gloria Interview. In a prearranged interview, Locklin and De Marco spoke with Gloria at the River Edge Diner a week and a half before the subject article was published (Pa1042, 1102). The purpose of the interview was to confront Gloria with the Record's investigative findings, so that Locklin could reflect Gloria's defense or rebuttal in the article and do any further investigation that might be called for (Pa1042, 1102).

In the interview Gloria did not deny the essential allegations of the subject article (Pa1043, 1102; see also Pb23). Rather (as conceded in his deposition), when

confronted with the results of the Record's investigation, Gloria acknowledged that he had spent too much time away from Turf, that his quality control had slipped, and that he would do better in the future (Pa1043, 1102, 1476-77, 1483-84; see also Pb23).

* * *

(pp44-45)

State legislation and administrative regulations further underscore the legitimate public interest in protecting consumers who purchase products or services like that offered by plaintiffs. See Dalleman v. Elizabethtown Gas Company, 77 N.J. 267, 270-71 (1978):

> The Consumer Fraud Act [N.J.S.A. 56:8-1 et seq.], originally enacted in 1960, is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate. ***
>
> The act as amended and supplemented is administered by the Division of Consumer Affairs, Department of Law and Public Safety. N.J.S.A. 52:17B-124. Detailed administrative regulations have been adopted, pursuant to the act, controlling selling and advertising practices in the areas of consumer sales which are subject to the act. N.J.A.C. 13:45A-1.1 et seq.
>
> The act provides for injunctive relief against unlawful practices, N.J.S.A. 56:8-8, monetary penalties for violation of the act, N.J.S.A. 56:8-13, and also permits a person,

> who suffers a loss due to a method, act or practice declared unlawful under the act, to sue and recover threefold the damages sustained, together with reasonable attorney's fees and costs of suit, N.J.S.A. 56:8-19.

Press reports on consumer matters serve as an important adjunct and indisputably implicate fundamental public interest considerations.

* * *

(p55,fn41)

As evidence of "actual malice," plaintiffs now argue that "[t]he reader was led to believe that Turf performed the tune up as its proposed remedy to the failure of the machine to start, rather than as a measure that Locklin authorized" (Pb52). Yet, this is precisely what happened, as Locklin's notes attest (Pa1072). Locklin did not bring the Bobcat to Turf and request that it be tuned up. When Locklin said it would not start, Turf told him that it probably needed a tuneup -- without even bothering to examine the mower. While plaintiffs try to excuse their conduct by claiming that Angelo, Turf's intake man, was not a mechanic (and arguing, without any support whatsoever, that Locklin knew this to be the case (Pb15, 17)), Angelo (according to his own affidavit (Pa983)) "ran Turf" for six years.

(p56,fn42)

Plaintiffs challenge Locklin's editorial judgment in not reporting that Winners subsequently returned to Turf (because, as he told Locklin, he needed a job) and that he was fired (for offering to do work on the side for customers)(Pb55). What plaintiffs ignore is the detail provided by Winners regarding Turf's practices -- specifics

corroborated by other sources. As Locklin testified, "[e]ach told strikingly similar stories of what occurred at Turf, and it was clear that they had not been in contact with each other for years" (Pa1038).

EXCERPTS FROM BRIEF OF DEFENDANTS-RESPONDENTS BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, AND MARY ANNE DE MARCO IN OPPOSITION TO CERTIFICATION DATED FEBRUARY 16, 1994 FILED WITH NEW JERSEY SUPREME COURT

SUPREME COURT OF NEW JERSEY
38,043
On Petition for Certification of a
Final Judgment of the Superior Court,
Appellate Division
SAT BELOW:
Michels, P.J.A.D., Kestin, J.A.D.,
and Wefing, J.S.C., t/a

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs/Petitioners,

v.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, and MARY ANNE DE MARCO,

Defendants/Respondents.

BRIEF IN OPPOSITION TO CERTIFICATION

WINNE, BANTA, RIZZI,
HETHERINGTON & BASRALIAN, P.C.
Court Plaza North
25 Main Street
Post Office Box 647
Hackensack, New Jersey 07602
(201) 487-3800
Attorneys for Defendants/Respondents, Bergen Record Corporation, David Hall, Byron

Campbell, Bruce Locklin, and Mary Anne DeMarco

Of Counsel:
Peter G. Banta
On the Brief:
Donald A. Klein
Craig L. Levinsohn

(pp16-17)

There is no "fabricated quote" (Masson) issue in this case; nor is there any "fact/opinion" (Milkovich) issue. Rather, plaintiffs rely on one abbreviated quote (Pa12-13) which has substantially the same meaning in edited, as unedited form[29] and a variety of so-called "false inferences" (P11-19) which have been tirelessly raised by plaintiffs in the past and rebutted at length by defendants.[30] Plaintiffs' argument reflects nothing more than an attempt, in contravention of Masson, to challenge defendants' editorial judgments and to rewrite the article to their own liking.

* * *

---

[29]After noting that Turf's salesman told Locklin that his mower could not be fixed, the article quotes the salesman: "We could have got you for $50 or $60" (Pa39). As Locklin testified, this language -- like other language used by Turf during the exchange (e.g., "money is strange") -- seemed similar to what he had heard during his investigation of car repair ripoff joints (Pa1030). "It seemed to be a predisposition towards the customer as a victim" (Pa1696). Editorial deletion of the further comment ("Obviously the tune up might have held you for a week or two or three") does not raise a Masson issue; its inclusion would not have

---

materially changed the meaning of the cited passage in the article.

[30]Defendants refer the Court to the detailed discussion of plaintiffs' scattergun, and meritless, claims at Db2-5, 11-32, 48-64; Pa103-24, 425-51.

(p19,fn34)

[34]*** In their Petition they [plaintiffs] state:

> Although defendants reported that "Turf misdiagnosed problems, recommended work that wasn't needed, and charged for work that wasn't done" (Pa102), De Marco admitted at her deposition that this was not true (Pa657; 955). This is plain evidence of defendants' knowledge of falsity.

(P15) (emphasis in original). De Marco made no such admission at her deposition. The abbreviated quote cited by plaintiffs is immediately preceded in the article by the sentence: "Reporters took mowers there [to Turf] three times" (Pa102) (emphasis added). De Marco, Locklin's research assistant, was involved in only one of the three visits and was only testifying about her particular experience (Pa657), Da11); she, in fact, testified that she believed that Turf "recommended work that wasn't needed" (Da11). The quoted passage of the article is principally supported by Locklin's experiences at Turf.

LETTER OF SHANLEY & FISHER, P.C. DATED NOVEMBER 21, 1994 TO STEPHEN W. TOWNSEND, CLERK OF THE NEW JERSEY SUPREME COURT

[Letterhead of Shanley & Fisher, P.C.]

November 21, 1994

BY HAND DELIVERY

Stephen W. Townsend
Clerk of the Supreme Court
Richard J. Hughes Justice Complex
CN-270
Trenton, New Jersey 08625

Attention: Joseph DeMarco (Personal and Confidential)

Re: Turf Lawnmower Repair, Inc., et al. v.
Bergen Record Corporation, et als.
Supreme Court Docket No. 38,043

Dear Mr. DeMarco:

In response to your request of this office to forward all depositions and affidavits of John Gloria, Bruce Locklin and MaryAnne DeMarco, we enclose the following:

(1) Deposition of Bruce Locklin (6 volumes);
(2) Deposition of John Gloria (6 volumes);
(3) Deposition of MaryAnne DeMarco (3 volumes);
(4) Affidavit of Bruce Locklin;
(5) Supplemental Affidavit of Bruce Locklin;
(6) Affidavit of John Gloria;
(7) Supplemental Affidavit of John Gloria;
(8) Rebuttal Affidavit of John L. Gloria.

The tapes of the June 3 and August 3 encounters between Locklin and Turf personnel are attached to the Supplemental Affidavit of Bruce Locklin. MaryAnne DeMarco did not file any affidavits in support of the motion for summary judgment.

Kindly let me know if you have any additional questions.

Very truly yours,

SHANLEY & FISHER, P.C.

Joseph M. Cerra

JMC/mac
Enclosures
cc: Thomas J. Cafferty, Esq. (w/o encs.)
Peter G. Banta, Esq. (w/o encs.)
Mark P. Denbeaux, Esq. (w/o enc.)
Richard E. Brennan, Esq. (w/o enc.)
Glenn S. Pantel, Esq. (w/o enc.)
John L. Gloria (w/o encs.)

LETTER OF WINNE, BANTA, RIZZI, HETHERINGTON & BASRALIAN, P.C. DATED NOVEMBER 21, 1994 TO NEW JERSEY SUPREME COURT

[Letterhead of Winne, Banta, Rizzi,
Hetherington & Basralian, P.C.]

November 21, 1994

New Jersey Supreme Court
Hughes Justice Complex
CN-963
Trenton, New Jersey 08625

Attention: Mr. DeMarco

Re: Turf Lawnmower vs. Bergen Record Corp.

Dear Mr. DeMarco:

This will respond to your telephone call to me on November 18th requesting a copy of the tape recording of Bruce Locklin at Turf Lawnmower on June 3, 1988.

The original recording by Mr. Locklin was recorded on a microcassette and, due to very high background noise, was of poor quality and much of it could not be deciphered. We sent it out to a commercial audio lab to see if they could improve the quality of the recorded sound so that a better transcript could be made. In turn, we received "enhanced" tapes of this and a cassette of another visit, and I am enclosing the enhanced copy prepared by Knorr Associates. I have made duplicates for Mr. Brennan and myself. Copies of the enhanced tapes were previously sent to plaintiffs' former counsel, Robert H. Jaffe, on July 11, 1991. See attached letter.

I enclose also for the Court a copy of the letter of July 25, 1991 by the principal of Knorr Associates, Norman R. Dotti, P.E., describing the process which was undertaken to filter out background noise and improve the audibility of the conversations.

I comparatively listened to portions of the unenhanced tape and the enhanced tape and found the unenhanced tape hard to follow and impossible in some areas, due to excessive background noise. A copy of the unenhanced tape is also available for the Court if it wishes.

Very truly yours,

Peter G. Banta

PGB:mg
Enclosure

Via Airborne Express

cc: Richard E. Brennan, Esq. (w/enc.)
Thomas Cafferty, Esq. (w/o enc.)

EXCERPTS FROM PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION DATED MARCH 27, 1995 FILED WITH NEW JERSEY SUPREME COURT

SUPREME COURT OF NEW JERSEY
38,043
ON MOTION FOR RECONSIDERATION

TURF LAWNMOWER REPAIR, INC., a New Jersey corporation and JOHN L. GLORIA,

Plaintiffs-Appellants,

vs.

BERGEN RECORD CORPORATION, DAVID HALL, BYRON CAMPBELL, BRUCE LOCKLIN, and MARYANNE DEMARCO,

Defendants-Respondents.

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

SHANLEY & FISHER, P.C.
131 Madison Avenue
Morristown, New Jersey 07962-1979
(201) 285-1000
Attorneys for Plaintiffs-Appellants Turf Lawnmower Repair and John L. Gloria

On the Brief:
Richard E. Brennan
Joseph M. Cerra

ARGUMENT

I

THIS COURT SHOULD RECONSIDER AND MODIFY ITS OPINION OF MARCH 15, 1995.

(A) The failure to distinguish between John L. Gloria and Turf Lawnmower Repair, Inc.

This Court's opinion did not address the distinction between plaintiff John L. Gloria ("Mr. Gloria") and plaintiff Turf Lawnmower Repair, Inc. ("Turf"). Rather, this Court treated the plaintiffs as if they were one and the same and concluded, without discussion, that Mr. Gloria, as an individual, is subject to the actual malice standard in this defamation action. Mr. Gloria is a private person who would ordinarily need to show only defendants' negligence in order to prevail in a defamation action. Moreover, there is not a single allegation in the defendants' report that Mr. Gloria, as an individual, engaged in any conduct violation of the Consumer Fraud Act. Since the allegations of defendants with respect to consumer fraud did not implicate Mr. Gloria personally, his libel case should be remanded for a trial under the appropriate negligence standard.

The defendants bootstrapped Mr. Gloria to the conduct of his business and then leveled a gratuitous personal attack upon him that was neither necessary nor in the public interest. This Court overlooked the undeniable fact that no public interest was advanced by defendants' "sting" on Mr. Gloria personally. Defendants' "public interest" purpose, the unmasking of Turf to the consuming public, could have been accomplished, and should have been accomplished, without the personal defamation of Mr. Gloria. The allegations that Mr. Gloria was vindictive, petty, and unethical -- which this Court recognized were voiced by people with obvious axes

to grind against Mr. Gloria -- were neither newsworthy nor information that advanced the public interest. It added nothing to the public interest aspects of the report.

This Court should address the distinction between Mr. Gloria and Turf. If this Court permits its decision to stand without modification, it will have granted a license to the press not only to comment on business practices of corporate and other business entities, but to destroy the personal reputations of the business owners themselves.

We urge this Court, therefore, to reconsider its holding, at least with respect to Mr. Gloria personally. The rule which should rationally emerge is that while commentary about deceptive business practices which may violate New Jersey's Consumer Fraud Act will be protected by the qualified privilege recognized in Dairy Stores v. Sentinel Publishing Co., Inc., 104 N.J. 125 (1986), the commentators will not be so protected when they stray into the realm of comment on the private persons who own or operate the business.

This is the dichotomy which is just; this is the dichotomy left unmentioned by this Court in its opinion.

* * *

Supreme Court, U.S.
FILED
DEC 6 1995
OFFICE OF THE CLERK

(5)

No. 95-424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TURF LAWNMOWER REPAIR, INC. and
JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN,
MARY ANNE DEMARCO, DAVID HALL
and BYRON CAMPBELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

PETITIONERS' REPLY BRIEF

THOMAS F. CAMPION
Counsel of Record
RICHARD E. BRENNAN
SHANLEY & FISHER, P.C.
Attorneys for Petitioners
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000

14 PP

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
PETITIONERS' REPLY TO THE COUNTERSTATEMENT OF THE MATTER INVOLVED	1
REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT	3
I - THIS COURT POSSESSES JURISDICTION OVER THIS PETITION	3
II - THE NEW JERSEY SUPREME COURT SPECIFICALLY INVOKED THIS COURT'S FIRST AMENDMENT DECISIONS	4
A. This Court has Recognized the Individual's Right to Reputation	4
B. The New Jersey Supreme Court Specifically Relied upon Precedent of this Court in Purporting to Resolve the Actual Malice Inquiry	5
C. The New Jersey Supreme Court's Arbitrary and Capricious Application of the Actual Malice Standard Violates the Equal Protection Clause	6

Page

III -

PETITIONERS HAVE NEVER CONCEDED THAT MR. GLORIA WAS THE "ALTER EGO" OF TURF AND HAVE ALWAYS MAINTAINED A DISTINCTION BETWEEN THEM 7

IV -

THE NEW JERSEY SUPREME COURT CITED AND PURPORTED TO RELY ON THIS COURT'S DECISIONS DEFINING ACTUAL MALICE 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:	**Page**
Gertz v. Welch, 418 U.S. 323 (1974)	4, 5
Hutchinson v. Proxmire, 443 U.S. 111 (1979)	1, 2, 6
Michigan v. Long, 463 U.S. 1032 (1983)	5, 9
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	5
Rosenblatt v. Baer, 383 U.S. 75 (1966) (Stewart, J., concurring)	4
Wolston v. Reader's Digest Ass's. Inc., 443 U.S. 157 (1979)	1, 6
Other Authorities:	
Restatement (Second) of Torts, § 600	9
Rules:	
Supreme Court Rule 14.1(h)	3

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners Turf Lawnmower Repair, Inc. ("Turf") and John L. Gloria ("Mr. Gloria") (collectively "Petitioners") submit this brief in reply to Respondents' brief in opposition to the Petition for Certiorari.

PETITIONERS' REPLY TO THE COUNTERSTATEMENT OF THE MATTER INVOLVED

Respondents' opposition brief, unfortunately, spends more time inventing procedural barriers to this Petition going forward rather than addressing the substance of the Petition or the merits of the arguments advanced in its support. In the opinion below, the New Jersey Supreme Court, with a holding uninvited by Respondents' briefs or arguments, granted the Respondents the benefit of the actual malice standard in this defamation action:

> We examine the article in its entirety assuming that all of its allegations are true. If, drawing all reasonable and normal inferences, the article reads fairly and describes conduct, activities, and events that would lead an average reader to conclude that the owner engaged in business practices that were unconscionable, deceptive, misleading, and reflected bad faith, then the actual malice standard would be applicable.

(33a).

Petitioners argued in their Petition that the effect of this holding, accepting at face value all allegations contained in the article for the purposes of resolving whether Respondents created the basis for an actual malice defense, arbitrarily and capriciously granted to Respondents the right to create their own defamation defense, in violation of this Court's decisions in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979). Respondents apparently have no meaningful response to this argument, hastily treating *Hutchinson* and *Wolston*, cases at the heart of the

Petition, in a brief footnote (Rb14) that trivializes the constitutional issues raised by the New Jersey Supreme Court's decision. Without belaboring the point, by accepting the veracity of all of Respondents' allegations, the New Jersey Supreme Court permitted the Respondents to create their own defense simply because of the sensational nature of the allegations they chose to include in their article. As this Court stated in *Hutchinson*, "[c]learly those charged with defamation cannot, by their conduct, create their own defense by making the claimant a public figure."

Equally absent is Respondents' response to Petitioners' argument that their proofs are more than sufficient to satisfy an actual malice standard under the standards announced by this Court. Respondents simply argue that this Court should pay no heed to the misapplication of constitutional principles by the courts below since, Respondents assert, this Court's time and resources are better spent on other matters. Most telling, Respondents provide this Court with no citations from the factual record to contradict the evidence of actual malice cited by Petitioners. Like the courts below, they state no basis to believe their defense that they acted without knowledge of the falsity of their allegations.

In place of substance, Respondents contrive jurisdictional barriers to this Petition, finding concessions where none were made and making procedural assertions without citation to or foundation in the record. For example, Respondents contest Petitioners' observation that the holding of the New Jersey Supreme was "uninvited by the briefs submitted by the defendant," but they provide no support or citation for their assertion that they invited the holding of that court. (Rb1). In fact, Respondents never argued in any manner to any court that the actual malice standard applies if by examining "the article in its entirety assuming that all its allegations are true," ... "drawing all reasonable and normal inferences," the article "describes conduct, activities, and events that would lead an average reader to conclude" that the business engaged in bad faith business practices. This holding was truly uninvited by the briefs

and arguments of the Respondent, as Petitioners fairly and correctly observed in their Petition.[1]

As for the other allegations contained in Respondents' Counterstatement of the Case (Rb2-3), Petitioners shall reply to each of these propositions, on the merits, in the course of replying to Respondents' statement of their Reasons for Denying the Writ. Petitioners have not misrepresented the holding of the New Jersey Supreme Court -- which is quoted above and speaks for itself -- or asserted "half truths" not supported by the record. (Rb2-3). Petitioners will refrain from such unfounded discourtesy and engage in a discussion on the merits of the Petition.

REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

I

THIS COURT POSSESSES JURISDICTION OVER THIS PETITION

It is ironic that Respondents, who so vigorously pressed their First Amendment rights in the three courts below, now argue to the contrary that there is no federal question invoked by this Petition.

Respondents begin their opposition brief by charging, incorrectly, that Petitioners' Statement of the Case does not comply with the mandate of Supreme Court Rule 14.1(h). A more careful reading of Petitioners' Statement of the Case reveals that it does, in fact, comply fully with the Rule.

Petitioners refer the Court to pages six and seven of the Petition where they specifically advised that since the trial court they have argued that the constitutional principles announced

---

[1] Respondents' claim that Petitioners' counsel should have claimed "surprise" in response to a question from an Associate Justice of the New Jersey Supreme Court concerning the Consumer Fraud Act, rather than address the question, is at the same time fatuous and revealing. (Rb2). Even then, the court never suggested its ultimate holding, previously stated in this brief, by which the media defendants were permitted to create their own defense.

by this Court set the standards by which New Jersey measures the actual malice inquiry. As noted in the Petition, Petitioners specifically framed this issue on their Petition for Certification to the New Jersey Supreme Court.

Petitioners further refer this Court to pages four and five of the Petition, where, citing *Gertz v. Welch*, 418 U.S. 323 (1974), they advised the Court that they have consistently argued throughout that "it was the nature of the activity that must trigger any public interest privilege." (P.4). Although Respondents assert that the equal protection arguments advanced by the Petitioners are afterthoughts (Rb6), Respondents overlook that it is the New Jersey Supreme Court's uninvited holding itself -- presuming that all of the Respondents' allegations are true for purposes of determining whether the actual malice defense has been established -- that permitted Respondents to rely on a defense created by their own conduct and allegations. It is this uninvited holding that arbitrarily and capriciously permitted Respondents to create their own defense. Petitioners respectfully request this Court to consider the constitutional dimensions of the uninvited holding which was never argued by Respondents at any time during these proceedings and finds no support in the prior precedent of either this Court or the New Jersey Supreme Court.

II

THE NEW JERSEY SUPREME COURT SPECIFICALLY INVOKED THIS COURT'S FIRST AMENDMENT DECISIONS

A. This Court has recognized the individual's right to reputation

Respondents argue that there is no "constitutionally protected right in ... good name and reputation" or equal protection of that right under the constitution. (Rb6-7).

Respondents miss the import of Petitioners' argument. As stated, this Court has recognized that an individual's right to reputation was "basic" to our constitutional system. *Gertz*, 418 U.S. at 341 (*quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, *J.*, concurring). Although *Gertz* ruled that the degree

of protection that will be afforded that right is a matter of state defamation law, a state cannot create or enforce its defamation laws arbitrarily or capriciously in a manner that offends the constitutional precept of equal protection. Accordingly, states may possess "substantial latitude ... to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," *Gertz*, 418 U.S. at 345-46 (*see*Rb7), but it is illogical to presume, as Respondents do, that this latitude is beyond the scrutiny of the equal protection mandate of the United States Constitution. As Petitioners stated in their Petition, "once a state establishes such a standard, it must apply that standard and remedy equally to all individuals . . . ." (P.9).

B. The New Jersey Supreme Court specifically relied upon precedent of this Court in purporting to resolve the actual malice inquiry

Respondents argue next that the New Jersey Supreme Court "applied an actual malice standard in this case as a matter of state common law, not federal constitutional law." (Rb7-13). In support of this contention, Respondents point to nothing in the decision below. That the New Jersey Supreme Court relied on federal constitutional law as established by this Court is beyond dispute. Justice Stewart Pollock regretted that the Court did not resolve the case "*without resort to constitutional principles*." (49a) (emphasis supplied). Further, the New Jersey Supreme Court observed that its function in this matter called upon it to balance the "often-conflicting goals of the First Amendment" -- a person's right to reputation against the right of First Amendment expression. (43-44a). It specifically cited *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) as the governing case. (41a).

Respondents argue, without citation, that the New Jersey Supreme Court merely employed constitutional principles by analogy, a statement found nowhere in the Court's opinion. This Court wrote in *Michigan v. Long*, 463 U.S. 1032 (1983):

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not

> clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

463 U.S. at 1041.

Unable to point to any language in the New Jersey Supreme Court's decision that would dislodge this Court's jurisdiction, Respondents resort to citations to other cases where the New Jersey Supreme Court discussed the creation of a state common law privilege for "public interest" speech. Even these decisions, however, highlight only that the New Jersey Supreme Court has extended First Amendment protection of the actual malice standard to certain "public interest" expression. Accordingly, while the New Jersey Supreme Court determined the issue of whether a qualified public interest privilege attaches to speech by reference to state common law, it herein resolved the issue of whether the privilege has been overcome, due to the speaker's knowledge of falsity or reckless disregard, according to First Amendment principles.

C. The New Jersey Supreme Court's arbitrary and capricious application of the actual malice standard violates the equal protection clause

Petitioners have previously stated the holding of the New Jersey Supreme Court and demonstrated how, by applying the actual malice standard on the assumption that Respondents' unfounded allegations are true, the decision grants to the media, arbitrarily and capriciously, the right to create their own defense to a defamation action, in violation of *Hutchinson* and *Wolston*. Ignoring these decisions, Respondents argue that the Court's application of the actual malice standard simply

because of what Respondents said about Petitioners "raises no federal question." (Rb13).

Respondents highlight that the New Jersey Supreme Court claimed that it focused on "Turf's actions." (Rb14). Regardless of this assertion by the court, it is beyond dispute that the court applied the federal actual malice standard not because of anything Turf did -- *Turf in fact did nothing that violated the New Jersey Consumer Fraud Act* -- but because Respondents, after a so-called investigation marred by, at best, their gross negligence, *merely accused* Petitioners of conduct violative of the New Jersey Consumer Act. In the reasoning of the court below, it was obligated to presume that Respondents' allegations were true. The court thereafter determined that two of these allegations, if true, would establish conduct violative of the New Jersey Consumer Fraud Act. After assuming the truth of these two allegations, the court extended First Amendment protection of the actual malice standard to the *entire* article. Irrespective of the court's assertion that it focused on Turf's activity, Petitioners lost the right to prove before a jury the falsity of Respondents' expression simply because the court presumed Respondents' accusations to be true. The court thus focused on what Respondents *said* that Turf did in determining whether a privilege applied. As such, the court's focus was on the speakers and the content of their speech and not, as it claimed, on Turf's activities.

III

PETITIONERS HAVE NEVER CONCEDED THAT MR. GLORIA WAS THE "ALTER EGO" OF TURF AND HAVE ALWAYS MAINTAINED A DISTINCTION BETWEEN THEM

Seeking to erect another procedural barrier, without opposing the merits of the argument that the decision below violates Mr. Gloria's right to equal protection, Respondents attribute to Petitioners the concession, at some undefined point of these proceedings, that Mr. Gloria is the "alter ego" of Turf, and allege that Petitioners have treated themselves interchangeably throughout. In support of this advocacy, Respondents grasp the slim reeds that Petitioners in the complaint described Mr.

Gloria as president and sole shareholder of Turf, and that in their Appellate Division brief, Petitioners wrote that Mr. Gloria "operated" Turf. Petitioners never conceded that Mr. Gloria was the "alter ego" of Turf and did not treat themselves interchangeably throughout.

Respondents further write that "the only allegedly defamatory statements identified in the Amended Complaint ... related to the activities of Turf." (Rb17). Nonetheless, Respondents' own appendix demonstrates that among other things, Petitioners' complaint highlighted statements that were plainly defamatory of Mr. Gloria's character -- that he "made bogus tune-ups standard procedure," that he "lied to customers," and that he got "vindictive if a customer got impatient." (R3a).

Mr. Gloria's rights as a litigant, apart from those of Turf, were specifically argued to the New Jersey Supreme Court, but its decision affirmed without explanation the grant of summary judgment against Mr. Gloria. The court did not decide if Mr. Gloria had been personally defamed or what standard should apply to Mr. Gloria's personal defamation claim.

Ruling separately as to Mr. Gloria, the Appellate Division determined that Mr. Gloria had not been personally defamed because the article did not infringe on his "zone of privacy." (57a). Petitioners pressed their argument regarding Mr. Gloria's private reputation rights, apart from the rights being asserted by Turf, in a direct challenge to this observation of the Appellate Division in their filings before the New Jersey Supreme Court:

> In reality, the article is not a consumer report. It is a personal attack on a private person whose private interests were intentionally bootstrapped to an alleged consumer report. The article makes reference to the car Gloria drove, the value and location of his house, and his family life, for example. None of this information is in the public interest, *and the Appellate Division erred in holding that it was.*

(Reply Brief in Support of Petition for Certification, February 28, 1994, pp. 4-5, n.2) (emphasis supplied). In this light, it is inexplicable that Respondents charge that Petitioners did not

seek to vindicate Mr. Gloria's personal rights, apart from those of Turf.[2]

IV

THE NEW JERSEY SUPREME CITED AND PURPORTED TO RELY ON THIS COURT'S DECISIONS DEFINING ACTUAL MALICE

Petitioners have previously shown that the New Jersey Supreme Court majority specifically relied on First Amendment principles -- one judge criticizing its reliance -- in resolving the actual malice inquiry. *Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983). In response to Petitioners' arguments that their proofs satisfy the actual malice standard, Respondents offer nothing more than their previously refuted claim that this Court's jurisdiction is lacking.

Respondents' contention that granting certiorari in this case would "federalize[] all common law privileges cases in states that adhere to the *Restatement [(Second) of Torts, Section 600]*" (Rb21) lacks merit. The jurisdiction of this Court can only be invoked in those matters, such as this one, where the court below invokes the First Amendment and its actual malice standard in resolving the issue of whether the claimant has overcome the qualified state law privilege. More correctly, if a state court invokes a state law fault standard to ascertain whether a claimant's proofs are sufficient to overcome a state law privilege, then federal jurisdiction would be lacking. The New Jersey Supreme Court, as noted by Justice Pollock, elected to resolve the actual malice inquiry by reference to constitutional principles, a fact which unquestionably confers jurisdiction over this matter in this Court.

Respondents make no effort to challenge the quality and quantity of Petitioners' proofs establishing Respondents' actual

---

[2] It is also beyond comprehension why Respondents write that Petitioners made "no argument to the contrary" in response to the Appellate Division's observation that all comments of which Mr. Gloria complained "related to Gloria in his status as owner of Turf." (Rb18-19). Petitioners plainly argued that the "Appellate Division erred" in so holding. (Reply Brief in Support of Petition for Certification, pp. 4-5, n.2).

malice. No court in this matter has made any effort to explain why, for example, Respondents' alteration of material quotations, their publication of knowing falsehoods, and their omission and distortion of material fact to imply knowing falsities is insufficient to demonstrate Respondents' actual malice.

Petitioners are mindful of the scarce resources of this Court, but they urge this Court to undertake the inquiry overlooked or taken for granted by the courts below. Since neither Mr. Gloria nor Turf are public figures capable of challenging the accusations of this large media defendant in the arena of public opinion, their only hope to vindicate their good names is through the judicial system. It is fundamentally unfair that a large media corporate defendant could utterly destroy the reputations of a small business and its owner with an article that results from its "gross negligence," and then hide behind the actual malice standard. If this small business and private person are to be held to the actual malice standard in the only forum in which they can vindicate their rights, then they should at least be given a fair hearing as to whether their proofs are sufficient.

CONCLUSION

Respondents offer no meaningful or substantive opposition to the Petition for Certiorari. They seek to erect procedural barriers and jurisdictional obstacles to the Petition, which are predicated on representations of the record that are demonstrably incorrect. Based on the foregoing, Petitioners respectfully submit that the Petition for Certiorari should be granted.

Respectfully submitted,

THOMAS F. CAMPION
Counsel of Record
RICHARD E. BRENNAN
SHANLEY & FISHER, P.C.
Attorneys for Petitioners
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000